LEGAL AND CONSTITUTIONAL HISTORY OF INDIA

Dr. S.S. Shilwant

SHOUT
SHARE
IT

THE CONSTITUTION OF INDIA

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

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Dedicated
to my
Revered Parents

FOREWORD

Journey from Constitution of East India Company to the Constitution of Independent India has been well presented in the book with emphasising narration of Legal and Constitutional developments during the British Period from 1600 to 1950 alongwith a brief reference to Aspects, Sources and Rule of Law as the roots of Indian Legal System. Certainly, the subject is of great interest and importance to the Academicians and Advocates. The chronological and analytical study reveals the infancy of modern Judicial, Legislative and Administrative institutions with their grown up process leading to the present era.

Dr. S.S. Shilwant has presented a systematic and excellent work raising the curiosity and satisfying as well. I hope the book will be very useful to the students for whom it is primarily meant and also to the legal community as a reference book.

Rohtak
Sept. 25,2002

Dr. C.P. SHEORAN
Professor
Head & Dean, Faculty of Law,
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OPINIONS OF LEGAL EXPERTS

*"**Legal and Constitutional History of India**" by Dr. S.S. Shilwant, is a comprehensive and complete treatise meeting all the requirements of the students of law and is also very useful for academics, lawyers and those engaged in historical research about laws. The text book provides very clear insights and clarity of thought throughout. The addition of part three pertaining to concept of law, sources and rule of law enhances the utility and importance of the book.*

Rohtak
Sept.25,2002

PROF. L. C. DHINGRA
Formerly Head & Dean, faculty of Law
M.D. University Rohtak-124001

The book by Dr. S.S. Shilwant is a systematic and linkage study of turning points in legal and Constitutional History of India. The developments which lead to the present Indian legal system have been incorporated according to the cause and effect principle. I hope it will clarify and satisfy the students, researchers and lawyers.

Rohtak
Sept.27,2002

Dr. SURENDER SHARMA
Head, Department of History
Vaish P.G. College Rohtak-124001

The study of the book contains historical chain of facts and law during British period. The evolution depicts the objects and reasons of passing the plans and various enactments satisfying the needs of that time. The study enlightens about the developments in executive and judicial circles in addition to legal and constitutional developments to which students, researchers are keen to know.

New Delhi
Sept.28,2002

S. BALAKRISHNAN
Senior advocate,
Supreme Court of India
New Delhi

PREFACE

I feel immense pleasure in presenting this textbook to the readers. The study is primarily meant for students, research scholars whereas it is also useful to advocates including those who have curiosity to know the historical development of Indian Legal System.

The endeavour has been made to place the material systematically, chronologically emphasising in detail the pivotal turning points of legal and constitutional developments which culminated into fundamentals of Modern Indian Legal System. The attempt has been made to place the facts in easy sequential order, therefore, the whole evolution has been divided into three parts, first being the legal development, the second is constitutional development and the third contains the information regarding aspects, sources and rule of law.

I must express my heartiest gratitude to Professor R.K.Raizada, Professor C.P. Sheoran, Professor Ranbir Singh, Professor L.C. Dhingra, Professor P.C. Juneja, Professor S.K. Bhatnagar, Faculty of Law, Maharshi Dayanand University, Rohtak and Professor Hoti Prasad, Faculty of Law, University, of Delhi for their active co-operation, encouragement and enlightenment on some complicated issues. I am also thankful to my colleagues and friends who spared time for me to have necessary discussion on the issues involved in the book. I also express my emotions towards my family who helped me in the study. Lastly, I express my gratitude to the Almighty Who gave me an occasion to complete this mission. Sh. Jai Parkash, Sh. Satbir Singh and Mr. Anand Mohan are also entitled to get my heartiest thanks due to their co-operation.

I hope the book will be useful for students, researchers and other intending readers who want to search on a desirous point.

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CHAPTER – I

PART-ONE

THE BRITISHERS AT SURAT

A. East India Company (The Charter of 1600)

I. Provisions of the Charter of 1600: The magnificent edifice of the British Kingdom in India was the creation of merely a company – a – corporation which was originally conceived for furthering the British commercial interests in the over-seas countries.

It was incorporated in England on the last day of December, 1600 by a Charter of Queen Elizabeth. This Charter settled the constitution, powers and privileges which were to be enjoyed by the Company.

The Company was to have a life of 15 years in the first instance. But the Charter could be revoked earlier by the Crown on 2 years notice, if the trade did not appear to be profitable to the realm.

The geographical limit incorporated many important countries like India, America, Africa etc. No other British subject could carry on trade within this sphere. Unauthorised traders were to be liable to forfeiture of their goods, ships and to imprisonment or such other punishment as might appear to be 'meet and convenient'.

The affairs of the Company were to be conducted on democratic principles. All the members of the Company were to form a General Court. This General Court was to elect every year a Governor and twenty four Directors. These persons were to form the Court of Directors and were to mange the business of the Company. The tenure of office of all these persons was ordinarily to be one year.

The Company was authorised, in its General Court to make, ordain and constitute laws, orders and constitution for good government of itself and for the better advancement and continuance of its trade and traffic. For due observance of the laws thus made, punishments and penalties by way of imprisonment, fines and amerciaments could be imposed. The laws and punishments, however, were to be reasonable and were not to be contrary or repugnant to the laws, statues or customs of England.

Evaluation of the Charter of 1600 : It will be noted that there is no reference to any factory or territory in the grant of legislative power. The grant was only for good government and good trade. It was never thought that the Company would acquire territories in any foreign country and become a political power.

First touch was given to English Law. The condition that the laws enacted by the company and punishments should not be contrary to those of England shows, that the idea was that there should not be any fundamental deviation or departure from the principles of English Law.

The punishment could only be fine and imprisonment. No law prescribing capital punishment could be enacted by the Company. Thus Death Sentence could not be imposed. According to Ilbert – "Easily grant of legislative power to the company is of historic interest as it is the germ out of which the Anglo-Indian Codes were ultimately developed."

II. The Charter of 1609

On May 31st, 1609 the Charter of the company was renewed by James I. The Charter of 1600 remained continued except the two modifications. Firstly, absence of any limit on the continuation of the Company. Secondly, Crown can

determine it on three years' notice on proof of injury to the public.

III. King's Commission

The Company soon found that its legislative power was inadequate. It could only impose fines or imprisonment and no harsher sentence such as death sentence could be imposed, therefore Commissions were issued.

(a) On the high seas : To meet the situation on the high seas, the Crown issued a commission to the Commander-in-Chief of each voyage separately, empowering him to inflict capital punishment for capital offences such as murder or mutiny. The first of such commissions was issued by Queen Elizabeth on the 24th January, 1601, to Captain Lancaster for the first voyage.

To obviate the practice of granting a separate royal commission for each voyage, King James I in 1615, conferred on the company a general power to itself issue such commissions to its captains subject to the condition that in case of a capital offence, such as wilful murder and a mutiny, the verdict must be found by a jury of twelve Company's servants.

(b) On the Indian soil : In 1623, James I granted to the Company the power of issuing commissions to any of its Presidents or chief officers in its settlements authorising him to punish offences committed on land by the company's British servants and to inflict suitable punishments on them, including death subject to the condition that a capital sentence could be inflicted "in case of mutiny, murder or other felony" after trial by jury.

IV. The Charter of 1661

This Charter conferred broad powers on the company to administer justice in its settlements. In 1661, Charles II

granted a new Charter to the company authorising the Governor and Council of each factory "to judge all persons, whether belonging to the company or living under them, in all causes, civil or criminal, according to the laws of England and to execute judgement accordingly."

Evaluation : First, the power under the Charter 1661 extended not only to the Company's servants but to all those who lived in the Company's settlements including Indians. Secondly, judicial power was granted to the Executive Govt. i.e. Governor and Council of a factory. Thirdly, justice was required to be administered according to the English Law. Thus English Law started to be operated. Fourthly, authorised all punishments including death sentence.

B. The Establishment of the Surat Factory

Company's representatives set their feet on the Indian soil during the reign of Jahangir in 1612. First requisite was to find out a suitable place where the company could locate its business centre. Surat was selected for this purpose. It already enjoyed the status of an international port because it was from here that the pilgrims to the holy land of Mekka and Madina started on their voyage every year.

The Portuguese were already settled there. A contest between the two took place; the Portuguese naval power was routed out. In 1612, the English were successful in establishing their factory on the Indian soil. To start with, the English entered into an agreement with the local Mughal Governor.

The factory at the time was merely a trading station. The main business of the Company was that of import and export. The factory consisted warehouses, offices and residential quarters for its officers. It was the first Presidency,

its administration was conducted by a President (or Governor) and Council. The President and every member of the Council were appointed by the Company. According to the practice, all the affairs of the factory were regulated by a 'majority vote' in the Council. The President did not have any veto power by which he could over-rule his colleagues in the Council. He merely had one vote.

The servants of the Company were divided into three classes. The juniormost were known as "Writers". They had to serve as such for five years on a small salary of £ 10 per year. After that period the servants were to become "Factors" and their salary increased to £ 20 per year. After three years more they came to be known as "Senior Factors". Lastly after the lapse of three more years, they were to become "Merchants" and received a salary of £ 40 per year. It was out of this last category that the important offices like the membership of the Council, Chiefs of subordinate factories etc. were filled up. These servants were given low salary. To make up this deficiency, these servants had a right to conduct their own private trade on land.

But after some time, English felt that to lend permanency to their establishment at Surat, they must contact the Mughal Emperor and secure facilities directly from him. With this purpose in view, James I despatched an ambassador, Sir Thomas Rao. He reached the Mughal Court at Agra in 1615 and succeeded in securing certain facilities for the English. The important ones were:–

1. They were allowed to trade and establish a factory at Surat in a hired house.
2. That the English were to be allowed to live according to their own religion and laws without interference.

3. Disputes among them were to be regulated by their own tribunals.
4. Disputes between an Englishman on one hand, and any Hindu or Muslim on the other, were to be settled by the established local native authorities.
5. In all cases of complaints and controversies, the Mughal Governor or Kazi of the place was required to do Justice to the English and protect them from all injuries or oppressions whatsoever. He was directed to 'aid and entreat them as friends with courtesy and honour'.

Thus Rao was successful in securing from The Mughal Emperor "the right to self government for the English". They were allowed to establish a factory at Surat; allowed to trade freely; allowed to regulate their affairs and relations inter-se according to their own laws, and to this extent, they were to be exempted from the local jurisdiction.

I. Administrative Powers : English had not territorial administrative powers. They had to govern themselves. Territorial administration was in the hands of Mughal Emperor.

II. Judicial Powers : Their affairs were to be regulated by their own tribunal comprised of Governor and Council. The President and Council of the factory had authority to administer justice in criminal cases. This authority was conferred on them under the commission of the English Crown which was firstly issued in 1601 to Captain. Later on, in 1623, the English King James I empowered the East India Company to issue commissions to any of their Presidents and his Council to, "Chastise, correct and punish all and every the subject of us, our heirs and successors employed by the Company". The death sentence could also be inflicted by this commission but

subject to two safeguards. Firstly it could be inflicted only after a trial in case of mutiny or other felony. Secondly, it could be inflicted only after a trial with the help of a jury of twelve or more Englishmen. The President and Council also decided cases of a civil nature and administered justice in this sphere too. Thus the Executive wielded the whole of the judicial power.

The affairs arising among the Englishmen themselves, they were to be governed by the English Law. The Hindu Law and Mohammedan Laws are religious in origin and character. The English merchants did not cherish the idea of being governed by any of them.

Regarding causes and transactions between Indians, they should be decided by the established native tribunals on the land. Regarding those causes and transactions in which one of the parties happened to be an Indian and other to be English, the Mughal had directed that they should be decided by the established native tribunals. No ruler could divest himself of his responsibility for the welfare of his subjects. It was therefore, insisted that cases arising among the Englishmen and the Indians must be decided by the established tribunals of the land. Thus Englishmen were under a two sided law at Surat.

Hindu Law and Mohammaden Law were applied in native Courts. Practically in all civil cases, justice was administered according to the personal laws of the Hindus or Muslims. The criminal law was entirely Muslim.

Defects in English Judiciary : The President and the members of the council on whom lay the responsibility of administering law and justice, were not lawyers. They were merely traders, and so they decided cases not according to the principles of

English Law but merely according to their own sense of justice and fairplay.

Defects in Native Judiciary : The administration of justice at the time suffered from many evils and vices. Corruption and bribery were very common. The result therefore, was that the Englishmen took law into their own hands. The condition of administration of justice in the local courts at the time was at a very low ebb. A few observations made by some English travellers depict the sorry state of affairs.

(1) Hamilton says – "The Mahomedans have the law in their hands and distribute justice best to those that pay best for it."

(2) Anderson mentions the following episode – "On one occasion, a party of dancing girls refused to appear before the Governor of Surat, as they had been ill paid on a former occasion. The Governor administered to them justice. They were dragged into his presence and beheaded then and there".

(3) According to Fryer – "A goldsmith found guilty of coining copper was punished for the crime as follows: First, they shaved his head and beard.. then, putting a fool's cap on his head, they sat him on an ass with his fact to the tail... and one of the drums was beat before him... being back to the prison, they cut of his hands, and let him lie there during the Governor's pleasure."

Surat ceases to be a presidency –

The company found the island of Bombay to be more convenient for its purposes. In May, 1687 the seat of the President and Council was transferred from Surat to Bombay and thereafter, Surat lost its pre-eminent position of being the Company's principal trading station in western India, so much so that it was even subordinated to Bombay.

CHAPTER – II

ADMINISTRATION OF JUSTICE IN MADRAS

Introduction

This and the subsequent two chapters seek to survey the growth of judicial institutions in three settlements viz., Madras, Bombay, Calcutta from their inception to the year 1726. The year 1726 constitutes a landmark in the Indian Legal History as it gave a new orientation to the judicial system in the Presidency Towns.

In Madras, the judicial institutions grew in three stages before 1726 : In the first stage, from 1639 to 1665, administration of justice was in extremely elementary state. The second period, which runs from 1665 to 1686 saw the establishment of the court of the Governor and Council, administered justice in civil as well as criminal cases to the inhabitants of the settlement. The third stage started from 1686 to 1726. The significant event in this period was the creation of two courts, the Mayor's Court and the Court of Admiralty.

FIRST PERIOD OF ADMINISTRATION (1639-1665)

Foundation of Madras (1639-1665)

I. White Town : Madras was founded in 1639 by one Francis Day who succeeded in acquiring a piece of land from a Hindu Raja. On this piece of land, the Company constructed a fortified factory. The fort was named as the Fort St. George. Inside the fort resided the Europeans and the British servants of the Company and this settlement came to be known as the white town

II. Black Town : The Raja also granted certain privileges to the Company along with the grant of the piece of land. The Company was granted the full power and authority "to govern and dispose of the government of Madraspatnam" which at the time was a small village existing near the Company's fort. In course of time, this village grew. Many persons were attracted to this place on account of the facilities of trade and commerce that it offered. The village came to be known as the Black Town as it was inhabited by the Indians. The whole establishment comprising of the white and Black towns later came to be known as Madras.

III. Administrative Set-up

To begin with, Madras was given the status of an Agency and its administrative head was called the 'Agent'. He administered the settlement with the help of a Council. This Agency was subordinate to the Surat which was the only Presidency in India, at that time. It was only in 1665 that Madras itself secured the status of a Presidency. In the beginning, affairs of the settlement were mostly commercial in nature and did not raise any complicated administrative problems.

IV. Judicial Set-up in White Town

In the White town, the Agent and the Council decided all cases, civil and criminal. Their judicial powers, however, were very vague and indefinite. They formed a very inefficient and a hesitating sort of a court. Very often they referred capital offence causes to England and took counsel with the authorities of the Company there. Because Agent and Council had no power to execute capital offences.

V. Judicial Set-up in the Black Town

The Company could have established courts under the grant of the Raja. But they did not do anything like that and left the old, traditional, indigeneous village system intact. Thus a 'Choultry Court' with the Adigar as the judge decided small civil and criminal cases. Adigar Kanappa who had inherited the office from his father abused his power at the Choultry. He was therefore, dismissed from office in 1652 and two English servants of the Company were appointed to sit at the Choultry.

The Choultry Court was merely a court of petty cases. No other court was created for trial of those civil and criminal cases which fell beyond the competence of the Choultry Court. Not much information is available about the method used for the purpose. Some vague ideas can, however, be formed from sundry references to some cases in the records of the period. These references shall reveal the trial and procedure in serious criminal cases like murder etc. which, as pointed out, the Choultry Court was incompetent to handle : In 1641, An Indian was accused of having murdered a Native woman. Some sort of a trial took place and he was found guilty of the offence. The Agent communicated these findings to the Raja who ordered that 'justice be done in accordance with the Laws of England'. Thereupon the man was hanged. This shows that in serious criminal cases reference was made to the Raja and punishment executed thereafter. In 1642, a British Soldier was killed by a Portuguese. The communication was made to the Raja. The Raja, ordered that the accused be executed and therefore, the man was shot dead.

In Capital cases committed by persons other than the British, reference was usually made to the Raja who invariably ordered that the accused be punished according to the ENGLISH LAW. It is possible that this practice arose because of the fact that the Agent and Council lacked power to inflict a death sentence under the Charter of 1600 and also punishment could be inflicted over only servants of the Company under it. It does not appear that the Company conferred powers on the Agent and Council under the commission of 1623. Even if it had, the power could not extend to anybody except upon the Company's British servants and it would not have thus covered the Indian inhabitants of Madras. So, they could inflict such a sentence only under the authority of the local sovereign. The one peculiar feature of this period appears to be the existence on the settlement of two separate and distinct bodies to administer justice, the Agent and Council for the White Town and the Choultry Court for the Black Town. Appeals from Choultry Court could be taken to the Agent in Council.

SECOND PERIOD OF ADMINISTRATION (1665-1686)

Reorganisation of the system (1665-1686)

I. Agent becomes President

The Charter of 1661 which had conferred extensive judicial Power on the Governor and Council of a settlement, did not become immediately operative in Madras. Things continued as they were. In 1665, there occurred an important case which proved to be the turning point in the history of legal establishments in the settlement. One Mrs. Ascentia Dawes, a British lady was accused of having committed murder of her slave girl, the case came for trial before the

agent and Council. As usual practice, the agent and Council referred the case to the authorities in London for their advice. The company, after much consideration, resolved that the Agency at Madras should be raised in to a Presidency along with his Council which might exercise judicial powers under the charter of 1661 which had conferred large judicial powers to the Governor and Council. As a result of this case the Agency at Madras became the Presidency of Madras in 1665. The administrative head of the place was designated as the President or the Governor.

Soon after, the President and Council at Madras conducted the trial of Mrs. Ascentia Dawes. The trial was held with the help of a jury. This is the first jury trial in Madras. After the trial, the jury declared Mrs. Ascentia Dawes as not guilty, and so she was acquitted.

The Governor and members of the Council, none of whom was a lawyer by education or training, found it difficult to meet the several legal complications that arose in cases. In a letter to the company they prayed that they needed the direction and assistance of a person better skilled in the laws. But in spite of this appeal, the company did not send a lawyer to Madras. Justice continued to be dispensed by the Governor and Council according to their wisdom and commonsense. The Governor and Council composed a court which had wide judicial authority over all Englishmen and Indians, under the charter of 1661.

II. Reorganisation of The Judicial System

(a) High Court of Judicature : In 1678, Streynsham master became the Governor of Madras. He was responsible for re-organising the whole system and putting life and

vigour into it. The court of the Governor and Council which came into existence in 1665 was not functioning very earnestly or regularly. Streynsham master and Council resolved that the court of the Governor and Council should sit more regularly. It was declared that the court would administer justice in all causes civil and criminal according to the laws of England ; that the court would sit on two days in a week and that all trials in the said court would be conducted by jury of 12 men. The court was designated as the HIGH COURT OF JUDICATURE.

(b) **The Choultry Court Reorganised :** The Choultry Court was reorganised and put on a new basis. Three officers viz mint master, paymaster and the customs master, were assigned the additional function of sitting at the Choultry Court on two days in the week. They were authorised to decide all cases up to the value of 50 pagodas. The Choultry Court was to decide petty civil and criminal cases. Appeals from this Court lay to the Court of the Governor and Council known as the High Court of Judicature. The High Court was not to entertain directly the cases cognizable by the Choultry Court but only in appeal, after the latter Court had given its verdict.

Evaluation

During this period a hierarchy of Courts thus came into existence in Madras. Two Courts i.e. a superior Court of judicature and a lower Court were established. Their respective jurisdictions were demarcated. The lower could take cognisance of cases up to 50 Pagodas (150 Rs.) and small offences. All the other cases beyond the jurisdiction of

Choultry Court and appeals from the lower Court, were to be heard by the High Court of Judicature with the help of jury.

THIRD PERIOD OF ADMINISTRATION (1686-1726)

Admiralty Court Created, Mayor's Court Created, Choultry Court Reorganised (1686-1726)

The monopoly of trade granted to the company by the charter of 1600 was being infringed on a large scale by interlopers independent merchants indulging in unauthorised trade and traffic against the tenor of the grant and thus the company was being put to a great loss. Further the Crime of piracy was also rampant on the high seas. To deal effectively with these two evils, need was felt to establish such courts as might have jurisdiction to try these cases. Consequently on August 9, 1683, Charles II granted a charter to the company authorising it to establish one or more courts at such place or places. The Court was to consist of a person learned in the civil law, hence two merchants were appointed by the company. It was to have power to hear and determine all cases, mercantile and maritime in nature. The Court was to decide cases according to the rules of equity and good conscience and the laws and customs of merchants. The Court was authorised to settle its own procedure. The chief judge of the Admiralty was to be known as the Judge - Advocate.

I Admiralty Court Created

Under this Charter, a Court of Admiralty was started in Madras in 1686, consisting of three civil servants who were members of the Governor and Council. In 1687, the company sent from England Sir, John Biggs, a professional lawyer learned in the civil law, to act as the Judge - Advocate

as required by the charter. The Admiralty Court started to function properly and in right earnest. The High Court of Judicature comprising the Governor and Council there after relinquished the judicial functions as it was replaced by Admiralty Court. The Admiralty Court did not confine itself only to hearing Admiralty cases proper as conceived by the Charter of 1683, but it exercised a much wider jurisdiction and dispensed justice in all cases, civil, criminal, maritime and mercantile. The Court used jury in criminal cases but not in civil cases. Sir Biggs died in 1689. Again, Governor and two members of the Council were appointed as Judge Advocate and Judges. This composition of the Court, it would be seen, was not warranted by the Charter which envisaged a civil lawyer and two merchants. In 1692 a NEW Judge Advocate, John Dolben was sent from England but his tenure was brief as he was dismissed in 1694 on the charge of taking bribes. In 1696, the Company directed that the members of the Council should in succession serve as the Judge Advocate. After 1704, the Admiralty Court ceased to sit. Its jurisdiction, including the hearing of appeals from the Mayor's Court (next heading), came to be exercised by the Governor and Council.

II The Mayor's Court (1687)

The year 1687 saw the setting up of yet another Court in Madras known as the Mayor's Court. The Court was a part of the Madras Municipal corporation which was established under a Charter of 1687, issued by the company and not by the crown. The Company issued this charter under its various powers that had been granted to it by the earlier Charter of the English Crown i.e. 1600.

The reasons for the creation of CORPORATION were: Firstly, The Dutch had applied the system of municipal government to a few places in the East with great advantage. Therefore, the Company thought of applying a similar system to Madras in the hope that it might lead to its further growth and development. Secondly, the Company wanted to start certain public welfare activities on the settlement. For this, money was needed and it was expected that it might be easier for an institution, in which the native population of the place was represented, to raise funds by Taxation. In this way, a composite body, consisting of all the heads and chiefs of all respective castes was established.

The corporation which came into existence in 1688 was to consist of a Mayor, 12 Aldermen and from 60 to 120 Burgesses. Charter itself appointed the first Mayor, who was a member of the Governor's Council, and all the Aldermen, three of whom belonged to the Council. Tenure of office of the Mayor was to be one year. He was to be elected every year by the Alderman and the Burgesses from amongst the Aldermen. The Mayor could be removed by the Aldermen and Burgesses in case he did not demean himself well in his office. Only an Englishman could hold the office of Mayor. The Aldermen were to hold office for life or remains residence within Madras. An Aldermen could be removed by Mayor, Aldermen and Burgesses. Any vacancy among the Aldermen was to be filled by them by election from amongst the Burgesses. Burgesses were to be selected by the Mayor and Aldermen. At least three Aldermen were required to be covenanted British servants of the company while the remaining nine could belong to any nationality. The break up

of the first 12 Aldermen appointed by the Charter itself was as follows : Englishmen 3 ; Hindus 3 ; Frenchmen 1 ; Portuguese 2 ; Jews and Armenians 3. A reserve power was vested in the Governor and Council to remove any Mayor, Recorder, Aldermen or Burgess and to appoint anyone in the place so falling vacant.

The Mayor and the three senior Aldermen were to be justices of the peace. The Mayor and Aldermen were to form a Court of record known as the Mayor's Court, which was authorised to try all civil and Criminal cases. In civil cases, where the value exceeded three pagodas and in all criminal cases where the offender was sentenced to lose life or limb. Appeals from the decisions of the Mayor's court lay to the Admiralty Court :

Since all the Judges in the Mayor's Court were lay persons, having no knowledge or training of Law, the Charter directed that Mayor's Court would attach to it an officer known as the Recorder. He was to be a man skilful in the laws and English born convenanted servant of the Company. The Charter itself appointed the first Recorder who was none-else than Judge Advocate Sir Biggs of Admiralty Court. He was to assist the Mayor's Court in the discharge of judicial work.

The Quorum of the Mayor's Court was to be the Mayor and two Aldermen. It used jury for deciding criminal cases, but not for civil cases. It sat once in a fortnight. For sometimes after the court's establishment, it remained doubtful whether it had power to award death sentence. In 1712, the Governor and Council decided that it could award death sentences to the natives only. Thereafter, it did award

death sentences to the Indians in many cases, but never to an Englishman. The Mayor's court dispensed justice not according to any fixed law, but, as its Charter laid down, "in a summary way according to justice and good conscience and the laws made by the Company."

Evaluation

Corporation's judicial wing, the Mayor's Court, however, continued to be active throughout the whole period. Its decisions lacked uniformity and consistency due to , it administered justice on the basis of 'justice and good conscience'. Recorder Sir Biggs gave assistance only in the cases of "considerable value and intricacy". Moreover, after the death of Sir Biggs no recorder was appointed. Thus his legal knowledge could not applied in deciding the cases. All the judges were non-lawyers. There is some evidence that court was not above influence. According to Alexander Hamilton –

"a few pagodas rightly placed could turn the scale of justice".

There was an anomaly in associating Sir Biggs as the Recorder with the Mayor's Court because he also sat as the Judge Advocate in the Admiralty Court which heard appeals from the Mayor's court. The anomaly removed when Sir Biggs died.

Generally speaking, the government had a great deal of influence over the Court. The Mayor and several Aldermen were members of the Council. Also the Governor and Council could remove any of the members of the Corporation and appoint some one else instead.

The relations between Governor and Mayor's court became rough, the reason being that personal animosities existed among the members of the government.

III. The Choultry Court Reorganised

After the creation of the Mayor's court, an important institution lost its importance and came to function as a court of petty jurisdiction trying only small offences and civil cases upto two pagodas. Two of the Aldermen were to sit twice a week at the Choultry to dispense justice in such petty cases. Thus, during 1686 to 1726 there functioned in Madras, the Choultry Court, Mayor's Court and for sometime Admiralty Court (or Governor and Council). Justice was mostly administered by non-lawyers in this period. This system existed upto 1726, when a new leaf was turned over in the history of judicial institutions in Madras, by the creation of a Mayor's Court – The Crown's Court.

CHAPTER – III

ADMINISTRATION OF JUSTICE IN BOMBAY

Introduction

Portugues were the first European nation to acquire Bombay in 1534 by cession from the king of Gujarat. In 1661, the island of Bombay was transferred to the English King Charles II, by the Portuguese king, as dowry, when the former married the sister of the latter.

The island of Bombay at this time was not a rich place as it grew to be. It was a small village having a few huts belonging to the fishermen. Finding it impossible to govern this small territory from England. Charles II, in 1668, transferred the island of Bombay to the East India Company for an insignificant annual rent of £ 10.

Before 1726, the Judicial system in the island of Bombay grew in three stages : the first - stage ran from 1668 - 1683, the second from 1684 to 1690 and the third from 1718-1726.

A. FIRST PERIOD OF ADMINISTRATION (1668 - 1683)

I. The Charter of 1668

At the time of the transfer, Charles II granted a charter to the Company conferring on it powers requisite for the governing of Bombay.

The Charter empowered the Company to make laws, ordinances and Constitutions for the good government of the island, and to impose, for due observance of the said laws, pains, penalties and punishments by way of fines, imprisonment or even death. The Laws and Punishments and Proceedings were under two fold restrictions, namely, the laws and Punishments and proceedings were to be 'reasonable' and

they were not to be 'repugnant or contrary but as near as may be agreeable to the laws of England'.

The Charter further authorised the Company to establish Court of Judicature, which were to be similar to those established and used in England. The Courts could determine and judge all actions, suits and causes.

Evaluation

A characteristic feature of this Charter was that it contemplated the establishment of Laws, Penalties, Procedure and Courts in the settlement on the English Lines. According to Ilbert "The Charter of 1668 marks the transition of the Company from a trading association to a territorial sovereign invested with powers of civil and Military Govt.

II. Judicial System : 1670

To begin with, the island of Bombay was under the control of the President and Council of the Surat factory. Bombay had a Deputy Governor and a small Council. The Governor of the Surat factory was an ex-officio Governor of Bombay also.

The main architect of first judicial system 1670 was Gerald Aungier, the Governor of Surat factory who has been described as the 'true founder' of Bombay.

The first judicial system of Bombay was a very simple affair. The island of Bombay was divided into two divisions : One division comprised of BOMBAY, MAZAGAON and GIRGAON; the other MAHIM, PAREL, SION AND WORLI.

A court was started in each of two divisions. Each court was to consist of five judges. They were to have powers to hear, try and determine cases of small thefts and all actions of civil nature where the subject matter did not exceed 200 Xeraphins (150 Rs).

The Custom Officer in each division, who was an Englishman, was to be President of the respective court. Three judges were to form the Quorum. Some of the judges were Indians, who were appointed for two main reasons : first - there was a paucity of suitable Englishmen. Second, it was done to 'sweeten' the English Govt. to the native population. All judges were honorary, no emoluments being given to them as judges.

In addition to these two courts, a Superior Court consisting of the Deputy Governor and Council was also started. The Superior Court was to hear appeals from the lower courts and was also to try all those cases, civil or criminal, which were beyond the jurisdiction of the lower courts. The Superior Court, therefore, enjoyed original as well as appellate jurisdiction. All trials in this Court were to be conducted with the help of jury.

Evaluation

However, Aungier was not satisfied with this system which, from all standards, was very preliminary. It suffered from three drawbacks : First – all the judges were traders, no legal knowledge. Secondly – No separation between Executive and Judiciary. Thirdly – No salary was given which caused instigation for bribe.

Aungier requested the Company to send some person, skilled in the laws. The Company was not willing to send a lawyer as it apprehended that he would only stir up strifes, litigation in the nascent settlement. Therefore, while refusing to send a lawyer from England, the Company advised Aungier to select some one knowing something of law from amongst the Company's servants in India. Aungier's choice fell on

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George Wilcox and a new judicial system was inaugurated in Bombay in 1672 with him as the pivot.

III. Judicial System : 1672

The Charter of 1668, under which Bombay was transferred by Charles II to the Company, envisaged the application of English Law on the island. The Company did not abolish the Portuguese Laws and Customs in 1672. It was only in 1672 that the Portuguese laws were formally abolished and English law instituted instead. This was effected by means of a governmental proclamation along with the creation of the new judicial system.

The scheme to administer justice put into force in 1672 was like this : A court consisting of a judge George Wilcox was established in Bombay. This court was to have jurisdiction in all causes, civil, criminal and testamentary.

(i) Criminal Justice

Administration of criminal justice was to be like this : Bombay was divided into four sections viz. Bombay, Mahim, Mazagaon and Sion. In every division, a Justice of the Peace, an Englishman, was appointed. His function was to arrest the accused and hold a preliminary examination of the witnesses. The Justice of the Peace was to act, not as a punitive court, but only as a committing magistrate for his division. He was to send the record of the preliminary examination to the Central Court (Wilcox's Court), where the case was actually tried

with the help of jury. The Court used to sit once a month to try criminal cases. All Justices of the Peace sat in the Court (Wilcox's Court) as assessors to help the Judge in deciding criminal cases.

(ii) Civil Justice

The Court of Wilcox was to sit once a week to try civil cases. All cases of civil nature were tried with the help of Jury.

(a) Court of Conscience : Below this Central Court, there was to be one other court, for the purpose of deciding petty civil causes. The court was known as the "Court of Conscience". The court was designed to dispense justice to the poor without any court fees. The court was to sit once a week. It tried all cases under 20 Xeraphins. George Wilcox, the Judge of the Central Court presided over the Court of Conscience also. All trials were summary and without a jury. Provisions was made for enabling persons to sue as paupers where the plantiff's income was not worth 60 Xeraphins. This court had exclusive jurisdiction under 20 Exraphins.

Appeals from the Central Court (Wilcox's) lay to the Deputy Governor and Council of Bombay.

In order to promote pure justice, the judge (Wilcox) was debarred from private trade and was put on a salary of Rs. 2000/- a year. To meet this and other charges of the Court, a fees of Rs. 5/- per cent on every cause, determined in the Court, was levied.

According to Malabari –

"In fact, no salary was actually paid to him (i.e. Wilcox). After his death, his widow who was in indigent circumstances prayed the government for payment of some money to her on account of her husband's salary".

The system continued to function upto the year 1683, when due to the 'Keigwin's rebellion' on the island of Bombay, it stopped working. The rebels surrendered the island to the Company in 1684. Keigwin's rebellion marks the end of the first phase of the evolution of the Judiciary at Bombay.

The rebellion had put an end to Court of Judicature started in 1672.

B. SECOND PERIOD OF ADMINISTRATION (1684 – 1690)

I. Admiralty Court

The second phase in the development and growth of the system of administration of justice in Bombay opened with the establishment of an Admiralty Court in 1684 under the Charter of 1683. This Court was exactly on the same lines as the one started in Madras in 1686. The Company sent from England Dr. John St. John, a person 'Learned in the Civil law', as directed by the Charter of 1683 to preside in the court as the Judge Advocate.

The Admiralty Court, to start with, took cognisance of all cases civil and criminal, in addition to the admiralty and maritime matters falling properly within the ambit of the Charter of 1683.

But, then, Dr. John lost favour with Mr. Child, the President of the Surat factory. The reason for this, as suggested by Fawcett, was that Dr. John had taken cognisance of some accusations against Mr. Child. On being asked by the Governor to desist from taking evidence against him, the judge replied that he was bound by oath not to conceal information coming to him against anybody, much less those in power. He retaliated in 1685 by divesting the Admiralty Court of the function of deciding civil and criminal cases and by confining it only to maritime and mercantile cases.

In 1685, another court on the lines of 1672 (i.e. Central Court) was started in Bombay to dispense justice in civil and criminal cases.

The Admiralty Court continued under Dr. John for a few more years thereafter. But the relations between him and Child were never cordial. Ultimately, Dr. John was dismissed from his office in 1687. After the exit, the Judge of new court (i.e. Central Court) also took over the charge as the Judge of Admiralty Court. Important to note is that Governor and Council at Surat was shifted to Bombay in 1687.

Evaluation

The treatment that was meted out to Dr. John at Bombay was remarkably different from that according to Sir Biggs at Madras. The Company reposed exceptional confidence in Sir Biggs.

According to Keith "Sir John Biggs was a protégé of the Company and enjoyed its favour."

The distinction between Sir Biggs and Dr. John was the independent character of Dr. John.

The experiment of appointing a professional lawyer from England, however, failed in Bombay. Because the Government was not in a mood to countenance any such independence on the part of the Judge. Dr. John's episode made the Company all the more reluctant to appoint professional lawyers as Judges in India.

In 1690, Bombay was attacked by Moghul Admiral Siddi. Siddi's attack put an end to the judicial system and thus came to an end the second period of judicial development in Bombay.

From 1690 to 1718 is the dark period in the legal history of the island. No court was established; the Governor and Council who had moved to Bombay from Surat in 1687, administered justice in a rough and ready manner presumably under the Charter of 1661.

C. THIRD PERIOD OF ADMINISTRATION (1718 – 1726)

I. Court of Judicature

After an eclipse of nearly 30 years in the sphere of law and justice, a new 'Court of Judicature' was created on March 25, 1718.

The new court consisted of a Chief Justice and nine other judges. The Chief Justice and five judges were to be Englishmen and the remaining four, Indians. The four Indian judges were selected in such a way that they represented the four principal Indian communities residing on the island such as Hindu, Mohammadan, Portugues, Christian and Parsi. The Chief Justice and 5 other English Judges of the court were members of the Council. The Court sat once a week, the court had full power and authority to hear and determine all cases, civil and criminal, according to English LAW, EQUITY and GOOD CONSCIENCE and THE RULES and ORDINANCES made by the Company. The Court was required to pay due regard to caste customs, orders of the Company and known laws of England. The Court was also to serve as a 'Registration House' for the registry of sales of houses, lands and tenements. The Court was given jurisdiction in probate and administration matters also.

II. Court of Governor and Council

The Governor and Council were to hear appeals from this Court. The Company prescribed a fee of five rupees for making an appeal.

Evaluation

The Indians on the Bench, it appears, did not enjoy the same status as the English Judges. They appear to have acted merely as assessors. There are two reasons to support: firstly

the Quorum of the Court of Judicature as mentioned above, was to be three English Judges and the Indian members of the Court were not to be counted for the Quorum. Secondly, in the beginning of each day's recorded proceedings of the Court, the English Judges present were mentioned individually by name, whereas the Indian Judges were mentioned, not by name individually, but collectively as Black Justices.

It administered justice in a rough, ready and commonsense way. It was not bound by any technical rules, law or legal precedents. There were no lawyers, no codes, no law reports.

In some cases, the Court awarded unlimited imprisonment i.e. 'during pleasure', but to day, even the worst offender is sent to prison for a fixed period.

The 39 Lashes were the normal punishment. Lash fell equally on males as well as females. It was inflicted not in any private place but in the public, so that others also might learn a lesson.

Theft of property worth forty shillings or more was not treated as a Capital Offence, but to day, there is no difference of capital or serious theft according to the quantum of the stolen thing.

The Court sometimes punished persons merely on suspicion and doubt. The modern rule is that a person should be punished only when his offence is proved beyond all reasonable doubt.

Unlike that of 1672, the Court of 1718 did not use a jury.

History after 1726

The Court initiated in 1718 continued to function upto 1728, when it gave place to a better Court, known as the Mayor's Court, which was established in Bombay under the Royal Charter of 1726.

CHAPTER – IV
ADMINISTRATION OF JUSTICE AT CALCUTTA (1690-1726)

Introduction

The foundation of the premier Indian City of Calcutta was laid on 24the August, 1690, when Company's few Englishmen under the leadership of JOB CHARNOCK landed at 'Sutanti' on the banks of the river Hughly. Here was constructed a fortified factory which was named as the Fort William.

In 1698, the Company was able to secure the Zemindary of the three adjacent villages of Calcutta, Sutanti and Govindpur from prince Azim-ush-Shan, grandson of Aurangzeb, who was the Subahdar i.e. Chief of Subha of Bengal at the time. It was on the site of these three villages that the modern city of Calcutta grew up. In 1699, Calcutta was declared to be a Presidency ; a President and Council was instituted to administer the Settlement.

Since the day, getting Zemandari of the three villages, the company began to exercise all those powers which the other Zemindars in the country enjoyed. So an English officer as the 'Collector' was appointed to exercise the power of Zemindar. He was to be a member of the Calcutta Council above mentioned.

Position of Zemindars in Bengal

During the 'palmy days' (i.e. flourishing days) of the Moghul Empire, the Zemindars in Bengal had authority to collect Land Revenues and were under a responsibility to maintain law and order within their respective Zemindary areas. Beyond, this, they did not have any other power. There used to be separate local courts for civil and criminal cases.

But when disintegration set in into the Moghul administration, these local courts ceased to function. A vacuum was created in the sphere of law and justice. There were some courts at Murshidabad, the seat of the government of Bengal, but their authority had become cabined and confined only to the area round about the capital. In the absence of any regular judicial tribunals in the countryside, the Zemindars themselves assumed the power to administer justice.

A. REPORT OF THE COMMITTEE OF SECRECY

The Committee of Secrecy, appointed by the House of Commons in 1773, in its seventh report gives us a picture of the system as it worked at the time in Bengal (during Zemindar's Court).

(i) Criminal Justice

It is like this: Each Zemindar maintained a Criminal Court to administer justice in criminal cases. His jurisdiction extended to all criminal cases including even those of a capital nature. A capital sentence, however, was not executed until it had been confirmed by the Nawab's government at Murshidabad.

(ii) Civil Justice

Each Zemindar maintained also an Adalat to administer justice in civil cases and to decide cases relating to revenue. In civil cases, appeals from the Zemindar's Court lay to the Nawab's Court at Murshidabad.

In this way, the whole judicial power in the interior of the country had become vested in the Zemindars.

B. FUNCTIONS OF COLLECTOR OR ZEMINDAR

I. Justice to Natives

(i) Criminal Justice : The English Collector maintained a 'Fozdari Court' to administer justice in criminal cases to the Natives. Procedure in this Court was summary. Trials were

held without the help of jury. In capital cases, however, the sentence was not executed until it had been confirmed by the Governor or President.

In all other cases, the Collector proceeded to sentence and punishment immediately after hearing. Death Sentences at the time were inflicted, not by hanging, but by whipping to death. Because the muslim rulers had regarded hanging as too ignominious a death for Muslims. Method of punishment were : Whipping, fine, work on roads, imprisonment and banishment.

(ii) Civil Justice : The Collector also maintained a Court to decide civil causes arising among the Natives. The procedure of this court also was very summary. The court administered justice in accordance with the customs of the country. In the absence of customs, however, the discretion of the Collector 'was' the deciding factor. Appeals from this court lay to Governor and Council.

(iii) Collection of Revenue and Justice

The Collector was responsible for the collection of revenue from the Zemindari lands. He took cognisance also of cases relating to revenue. Usually, he inflicted corporal punishment to force the defaulters to pay their arrears of revenue.

Special features : Administration of justice at Calcutta by Englishmen was generally modeled on the pattern of other Zemindaris in Bengal. But it had two distinguishing features. Firstly, it has been pointed out above that a capital sentence, passed by a Zemindar, would not be executed until it was confirmed by the government of the Nawab. But the English inflicted death sentences without seeking any confirmation from the Nawab. The Collector used to execute the death

sentence with the approval of the Governor and Council and no reference was made to the Nawab in this connection.

Secondly, as seen above, in civil cases also, appeals from a Court of a Zemindar lay to the Nawab's Courts at Murshidabad. But no such appeals lay from the Collector's court at Calcutta to the Murshidabad Courts. Appeals from the Collector's Court lay only to the Governor and his Council within the settlement. These features of the judicial scheme at Calcutta show that, from the very beginning, the Company's representatives at Calcutta asserted and exercised more powers than belonged to them as Zemindar.

IV. Justice to the Englishmen

In the sphere of criminal law, the Collector's Court appears to take cognisance of only petty crimes and misdemeanours committed by the Englishmen. Cognisance of serious criminal offences was taken by the Governor and Council, under the authority of the Charter of 1661.

Evaluation :

The administration of justice in civil and criminal cases in Calcutta, was very primitive and rudimentary. All judicial powers and collection work in the settlement were concentrated in one officer, the Collector. This system continued to operate upto 1727.

History after 1726

After 1726, the Courts came to derive their authority from the Royal Charter. Thus Mayor's Courts took place.

CHAPTER – V

ESTABLISHMENT OF THE MAYOR'S COURT

A. Introduction

Hitherto there existed different types of judicial systems in the three Presidencies i.e. Calcutta, Madras, Bombay.

1. George I, King of England granted the Charter of 1726 to the Company which turned over a new leaf in the evolution of judicial institutions in the three presidencies i.e. Calcutta, Madras, Bombay. The courts were put on an entirely new basis. The Charter established, for the first time, Crown's Courts in the presidencies on a uniform and definite basis.

2. It also affected some other significant changes in the administrative set up of the three principal stations, as for example, the establishment of corporations.

3. In addition, the Charter of 1726 also established a first local legislature in each presidency town, and thus the locus of legislative power was shifted from England to India.

4. Further, the Charter of 1726 initiated the system of appeals from the courts (i.e. Governor and Council) in India to the Privy Council in England for the first time.

On account of its great importance in the sphere of law and justice, the Charter of 1726 is usually called as the 'Judicial Charter'.

B. Reasons for Granting the Charter of 1726

1. The directors of the Company presented a petition to George I stating that there was a great want at Madras, Fort William, a proper and competent power and authority for speedy and affectual administration of justice in Civil Cases and for trying and punishing of capital and other offences. As H. Cowell observed, "A representation made by the Company

to the Crown regarding the state of general administration of justice is said to be the reason of granting the Charter." According to Fawcett, "It is false reading of the history to say as has been said that the Company complained of the courts as bad and inefficient".

2. Further, a Corporation had been created in Madras in 1687 and the Company was anxious to create similar Corporations in Bombay and Calcutta also.

3. According to Fawcett –

> "Moreover, many Englishmen died in India leaving behind immovable property and movable effects. There was no competent court in any of the towns at the time, which could undertake a proper distribution of property of a deceased Englishman, in accordance with will, if any, or in accordance with the law of intestate succession. The absence of such a jurisdiction in India involved the Company in vexatious and frivolous suits in England at the hands of the relatives of the deceased persons".

C. Provisions of the Charter of 1726

1. Corporation – The Charter of 1726 provided, inter alia, for the creation of a Corporation at each of the three principal stations of the Company, namely Calcutta, Bombay and Madras. The Corporation was to consist of a Mayor and nine Aldermen. The Mayor and seven Aldermen were to be natural born subjects of the English Crown. The remaining two Aldermen could, however be the subjects of any other prince or state in amity with the English King. The first Mayor and the nine Aldermen were appointed by the charter itself.

The Mayor was to hold office for one year only. The Aldermen were to remain in office for life or remains residence in the town. Every year, the Mayor and Aldermen themselves were to elect a new Mayor out of the Aldermen. Any vacancy among the Aldermen was to be filled by the Mayor and the remaining Aldermen themselves from amongst the principal inhabitants of the town.

The Governor and Council was empowered to remove any of the Aldermen from his office, on reasonable cause being shown against him. The aggrieved Alderman, however, had a right to appeal to the King in Council in England against his dismissal.

2. **Civil Jurisdiction : The Mayor's Court** – In each Presidency Town, the Mayor and the nine Aldermen were to constitute the Mayor's court. The quorum of the court was to be three. The Court was to have authority to hear and try all civil suits arising within the town and its subordinate factories. The first appeal from the court lay, within fourteen days, to the Governor and Council, from where a further appeal could be lodged within fourteen days, with the King in Council in all matters involving 1000 Pagodas or more. Thus for the first time, a right of appeal to the King in Council, from the decisions of the courts in India was granted.

The Mayor's Court, being a Court of record, could punish persons who were guilty of its contempt.

The Mayor's Court was further vested with a testamentary jurisdiction. The Court was authorised to grant probates of wills left behind by the deceased Englishmen. In case a person died intestate, the Mayor's court was empowered to grant letters of administration to the near relatives; failing

which, to any other person deemed proper by the court for the purpose.

The Charter of 1726 did not lay down in explicit terms what law the Mayor's court was to administer. It merely said that the court would 'render its decisions according to 'Justice and Right'. Now, the Charter of 1661 had expressly prescribed English law according to which justice was to be administered by the Governor and Council in each settlement of the Company. In the context, therefore, it was very clear that the Mayor's court also was to be a court of English law. As will be seen later, the date of introduction of English law in India is associated with the Charter of 1726. It has been judicially held that no other charter issued later introduced the English law in India.

As Rankin observed, "It has long been accepted doctrine that this charter introduced in the Presidency towns, the law of England – both Common and Statute Law".

3. Criminal Jurisdiction : The criminal jurisdiction was conferred on the Governor and the five members of the Council at each presidency. In the first place, each one of them was appointed as a justice of the peace, and in this capacity, they could order to arrest persons accused of having committed crimes, and could examine the prisoner and his accusers, put the evidence against the prisoner into writing and ultimately sent the report to the Court of 'Quarter Sessions'. However, they could individually, punish those who were guilty of petty offences.

In the second place, the Governor and the five members of the council, above mentioned were to form a court of record. All of them, or any three of them, were authorised to hold Quarter Sessions of peace, four times a year. They were to

enjoy, in the technical English terminology, the powers of a court of 'Oyer Terminer and Gaol Delivery'. As such they could try and punish each and every criminal offence, except high treason (i.e. treachery against state or king). They were empowered to try each offence committed within the Presidency town, or in any factory subordinate thereto.

The Charter of 1726 made provisions for the employment of the Grand Jury of 23 persons as well as Petty Jury by the Court of Quarter Sessions for the trial of Criminal offences. When a suspected person was sent to the Quarter Session for actual trial, the evidence for the accusation was placed before the Grand Jury, and their duty was simply to decide whether, on the evidence of the prosecution, there was a case to go for trial or not. After the accusation or indictment had been found the next step was to try the prisoner. For this purpose a new jury, called the Petty Jury, would be empanelled, to hear both sides and try the issues of fact. If the Petty Jury returned the verdict 'guilty' for the prisoner, he was to be sentenced by the court of Quarter Sessions.

The Charter of 1726, introduced all the technical forms and procedures of the English Criminal Judicature in the three presidencies as it was explicitly laid down in the Charter.

4. Legislature

Hitherto, the power of making laws was vested in the Company only which could be exercised by the Court of Directors of the Company. Plainly, it was very desirable that persons on the spot, who understood the local conditions and circumstances, be endowed with the authority to enact laws. Accordingly, the Charter of 1726, empowered the Governor and Council of each presidency to make by laws, rules, and ordinances for the good government and regulation of the

Corporation and inhabitants of the respective town. The Governor and Council could impose reasonable pains and penalties. The by-laws and the rules, as also the punishments for their breach, were to be 'agreeable to reason' and not 'contrary to the laws and statutes of England.' Further, no such by-law or rule was to be of any effect until and unless it had been approved and confirmed in writing by the Court of Directors of the Company. In this way, the Charter of 1726 created three 'subordinate power of legislation' in India at each of the three presidency towns.

According to Keith – "It was also desirable that legislation to suit local conditions should be enacted in India".

D. Charter of 1726 v. Madras Charter of 1687

The Charter of 1726, creating a corporation and several courts in each Presidency was on lines parallel to the Madras Charter of 1687. But nevertheless there were certain important differences between the two :

In the first place, the new Mayor's Court was to have jurisdiction only in civil cases. It did not have any criminal jurisdiction. The old Madras Mayor's Court had a wider jurisdiction as it was competent to take cognizance of all cases, civil as well as criminal.

In the second place, appeals from the new Mayor's court lay to the Governor and Council of the respective settlement. In all cases involving one thousand pagodas or more, a further appeal from the Governor and Council lay to the King in Council in England. Appeals from the old Mayor's court, however, lay to the Admiralty Court at Madras.

Thirdly, the Mayor's court of 1726 was a Crown's court. The old Madras Mayor's court, on the other hand, was purely and simply a court of the Company.

Further, the old Mayor's court did not have any jurisdiction in testamentary matters whereas the new Mayor's court had such a jurisdiction.

The old Mayor's court at Madras had a lawyer attached to it in the capacity of the 'Recorder'. The new Mayor's court, however, did not have any such officer, though its Judges were, as usual, lay persons and in no way superior in legal knowledge or learning to those who constituted the earlier court in Madras.

The Madras Corporation of 1687 consisted of twelve Aldermen, out of whom at least three were to be Englishmen, the rest could belong to any other nationality. Thus the Court consisted of quite a good number of Indians as Judges. The new corporation, on the other hand, was to consist of Mayor and nine Aldermen, out of whom all except two were to be Englishmen. The new Mayor's court was thus too much English-ridden. Thus no Indian ever appointed subsequently in the new courts. All the Judges in this court used to be English servants of the Company.

The old Madras Mayor's court was not bound by any technical rules of law and procedure. It was more a Court of Equity rather than of law. The Mayor's court of 1726, however, was a Court of English Law, and its procedure was modelled on the lines of the courts in England.

Under the arrangements that prevailed in Madras during the period 1687 to 1726, criminal justice was administered by the Mayor's court as also by the Admiralty court in appeal. The executive government there, did not play any part in this sphere and even in civil matters, appeal was heard by Admiralty Court. But by the Charter of 1726, however, this authority was re-transferred to the Governor and five senior members of the Council to try criminal causes and even to hear

appeal in civil causes. Thus Charter of 1687 advocated for separation of executive and Judiciary in the judicial affairs.

Looked from these points of view, the Charter of 1726 was inferior to the Charter of 1687 in regard to the justice.

E. Working of the Mayor's Courts : 1726-1753

The post charter period was marked in each presidency with disputes and conflicts among the Government, the Corporation and the Mayor's court. The Corporation created by the Charter of 1726 was an autonomous body, to a very great extent free from the control of the executive government of the Presidencies. These elements show the autonomous character : Appointment of the Aldermen was not in the hands of Governor and Council. The tenure of an Alderman was for life. Further, the Corporation was to elect its own Mayor. The Governor and Council could remove an Alderman for misconduct in his office, but they could do so only after a proper hearing of his defence and not for extraneous reasons. Moreover, the dismissed Alderman had a right of appeal to the King in Council against the orders of the Governor and Council. Further the court of Governor and Council, an appellate authority was not last resort but a second appeal could also lie to the King in Council.

But the feature i.e. the independence of the judiciary from the executive, which was a definite advance over the past arrangements, proved to be irksome to the Company. The Governor and Council, Corporation and Mayor's court came into collision says Kaye – "neither law nor justice was treated with much respect". Many cases arose where the government of a Presidency town wanted the Mayor's court to act in a particular way, and the latter refusing to act accordingly :

a. Animosity Between the Mayor's Courts and the Governments

(i) In Bombay : Some case illustrated by Fawcett – In 1730, the question arose whether the Mayor's court had jurisdiction in caste and religious matters of the natives. A Hindu woman became a convert to christianity. Here son aged about twelve years, left her and went to live with a relative. The mother charged the relative with improperly detaining some jewels, and as a sequel, the Mayor's court ordered the relative to deliver the boy to his mother. The head of the caste complained to the Governor. The Governor and Council resolved that the Mayor's court had no authority to determine 'causes of a religious nature or disputes concerning castes among the natives.' The Mayor's court however, strongly protested against this. As a result of this case, the relations between the two bodies became very much strained.

Arab Merchant's Case : Another dispute arose between the court and the Council during the same year. An Arab Merchant sued in the Mayor's court to recover the value of pearls said to have been extorted from him by his rescuers from a burning boat at the coast of Gujarat. The defendant had been previously tried for piracy in regard to the same occurrence and acquitted. The Council suggested to the Mayor's court that the claim of the Merchant was not valid. The Mayor's court, however, ignored this suggestion of the Council and decreed the suit. On appeal, this decision was reversed by the Governor and Council. The relations between the two bodies thus became all the more bitter.

(ii) In Madras : According to Love – The corporation being short of funds applied the collected court fines on the maintenance of public works for which it had a responsibility.

The Mayor's court not having adequate financial resources for its maintenance, spent the money deposited by the suitors.

There was general reluctance among the Englishmen to accept the office of Aldermen and it was difficult to get an adequate number of Aldermen. The Mayor's court therefore started the practice of imposing fines on those who refused to act as Alderman. The Government did not like this and maintained that the court had no authority under the charter to inflict such pains and penalties. The court replied that the Council could not direct it in the discharge of its duties.

Sukku Ram's Case : The Council brought a suit in the Mayor's court against Sukku Ram for a breach of contract. The Council enjoined the Mayor's court to issue a warrant of execution against him. The court delayed so. The Mayor and Aldermen put in a demurrer pleading that "the members of the Court of Appeal were President and Council and therefore, interested parties". Such reply increased the conflict.

(iii) In Calcutta : Not much information available as to how the Mayor's court functioned at Calcutta but presumably, things were no better there. It also involved in a conflict with the Zemindar's court there.

b. Animosity between the Mayor's Court and the Natives

It has already been pointed out that the Mayor's court were the courts of English law and were not required to keep in view the peculiar customs and manners of the Indians. The Company directed that the Natives, if they so desired, might not bring their disputes before the Mayor's court and could decide them among themselves according to their own customs, laws and manners, but if they come before these courts then, the Company insisted, they would be subject to the

English law and nothing else. This was only a negative policy. But no positive step was taken, no alternative judicial system was created where their customs and manner could be respected.

The procedure of the Mayor's court was very different from the traditions, manners and habits of the Indians.

Each case tried by these courts, therefore, generated some heat and passion among the Indian inhabitants of the settlements. Reference has already been made of the case of the Hindu woman convert to christianity and the resultant bitterness arising therefrom. A similar incident occurred in Madras also. There the Mayor's court insisted on respectable Hindus to take the "Pagoda Oath" instead of the 'Geeta Oath". In 1736, the Madras Mayor's court imprisoned two Hindu merchants on their refusal to take the pagoda oath. This infuriated the Hindu residents, who collected in a crowd and went to the Governor. Apprehending breach of peace, the Governor intervened and released the two arrested men on Parole.

F. Evaluation

The inhabitants of Madras therefore, sent a petition to the Court of Directors stating their grievances and proposing that they be exempted from the jurisdiction of the Mayor's court, except only in those cases where both the parties agreed to refer the case to the court for its decision. Such was the stormy career of the judicial system of 1726. Commenting upon the conduct of the Mayor's courts, Fawcett says that "though the conduct of the courts may at times have been unduly factious or discourteous, in the main it was inspired by the laudable aim of judicial independence and integrity . The charter gave a decided impulse to the promotion of the idea of

absolute impartiality so admirably expressed by Aungier at the opening of the Court of Judicature in 1672".

In Company's opinion the conduct of the Mayor's courts was 'factious' and 'discourteous'; they had assumed greater power than had been conferred on them by Charter. Kin George II decided to strengthen the Executive and to weaken the Judiciary. This was achieved in 1753 by a new charter.

G. Reasons for Granting the Charter of 1753

1. Because of growing tension between courts and Councils.
2. Demand of exemption of natives from the jurisdiction of the court.
3. In 1746 the French occupied Madras and surrendered it to British in 1749. During the period of French occupation, the Madras Corporation established under the Charter of 1726 ceased to function. The Company requested the Crown for a new Charter, thus King George II issued, in 1753. The Company utilised this opportunity to remove the defects which had been experienced in the working of the old Charter. The new Charter was made applicable not only to Madras, but to Bombay and Calcutta also.

H. The Charter of 1753

The Charter of 1753 issued by George III was therefore, a modified version of the previous Charter. It continued in substance the erstwhile institutions subject to the following notable adjustments and modifications.

1. Corporation Subservient to the Government : Firstly, to put an end to the dissensions and disaffection that had developed in each presidency between the corporation and the Mayor's court, on the one hand, and the Government, on the

other, the Charter of 1753 'made the Corporation subservient to the Government.' This was affected by changing the method of appointing the Mayor and Aldermen : All the Aldermen were henceforth to be appointed by the Governor and Council. As regards the Mayor, the Governor and Council were to select one out of a panel of two names of Aldermen submitted to it by the corporation every year. The power of dismissal already vested with the government by the Charter of 1726.

2. Exemption of Natives Secondly, the jurisdiction of the Mayor's Court was expressly restricted vis - a - vis the Indians. The court was debarred from entertaining a suit and action between the natives until both parties involved in a matter submitted it for the court's determination.

According to Morley "This provision to be the first reservation, of their own laws and customs, to natives".

3. Court of Requests : Another significant feature of the new charter was the creation of the Court of Requests at each presidency town. The jurisdiction of the Courts of Requests was limited to Five Pagodas or nearly 15 rupees. The court was to be manned by Commissioners, numbering between eight and twenty four, three of them were sitting at a time by rotation. The court was to sit once a week. The first Commissioners of the Court were to be appointed by the Governor and Council. Thereafter, one half of the Commissioners were to retire every year, the remaining Commissioners were to fillup the vacant place by ballot. Bolt - admires about the independence of the Court. – "The Court of Requests is in fact, the only court in Calcutta which from being under little or no undue influence, is of real and essential service to the poor inhabitants, and this principally because the

members fill up all vacancies in the court by ballot among themselves." This court functioned upto 1850.

4. Evidence on Oath : The charter also made provisions for evidence on oath by the Christians and in case of the Indians "in such manners as they according to their several castes shall esteem to be most binding on their conscience, to oblige them to speak the truth."

5. Suits against Mayor and Company : The Mayor's court was expressly authorised to entertain an action against the Mayor. No person was to sit as Judge to hear a matter in which he was in any way interested. The Mayor's Court was specifically empowered to hear suit against the Company and such suit were to be defended by the Government.

Under the Charter of 1753, therefore, a Presidency came to have the following courts : Court of Requests; Mayor's Court to decide civil cases; Court of Governor and Council to hear appeals from the Mayor's Court; Justices of the Peace and the Court of Quarter Sessions consisting of the Governor and five members of the council to decide criminal cases. The Privy Council in England was the ultimate court of appeal in only civil cases.

I. Courts for the Natives

As pointed out above, the Charter of 1753 excluded natives from the purview of the Mayor's Court, except when both the parties voluntarily brought their disputes before the court for its decision. Further, the Mayor's Court was a Court of English law, and as such, it could not be of much use to the Indians whose peculiar customs, usages and laws did not receive proper attention in this court. In small cases upto five pagodas, the Court of Requests in each Presidency dispensed justice to all. But for deciding cases of higher value among

the natives, it was evidently necessary to have some other suitable tribunal in each Presidency.

Calcutta : Because Court of Request heard the cases upto 5 Pagodas and for above amount Calcutta faced no difficulty in this respect. Zemindary Courts, which the Company created in its capacity of Zemindar, had already being functioning there since 1698. This court had not ceased working even after the advent of the Mayor's Court in 1726 and even after 1753 hence it continued to function and dispense justice to the natives, as usual, in cases where disputes were of above 5 Pagodas.

Bombay : No additional court was ever created in Bombay for dispensing justice to the natives in cases beyond five pagodas. In the absence of such tribunal the native inhabitants of Bombay continued to resort to the Mayor's court for getting their disputes settled. The Mayor's court did not observe the restriction imposed on its jurisdiction in such cases by the Charter of 1753. Its view appears to have been that the natives of Bombay were all British subjects (due to the fact that Bombay had been ceded to the English in full sovereignty by the Portuguese) and so the restrictive words in the Charter did not apply to them. It is the opinion of Morley – "it does not appear that the native inhabitants of Bombay were actually exempted from the jurisdiction of the Mayor's Court, or that any peculiar laws were administered to them in that court".

Madras : In Madras, pursuant to the inauguration of the Mayor's Court in 1727, justices of peace were also appointed justices of the Choultry Court to decide small cases upto 20 pagodas. Appeals from the Choultry Court went to the Mayor's Court from where a further appeal could go to the Governor and Council. Court of Request dispensed justice upto 5 pagodas. In 1774, the Choultry Court was abolished

temporarily. Finally in 1800, all its vestiges were abolished. At last in 1796 a Simple Court under a servant of the Company was improvised for the purpose of deciding civil cases over 5 pagodas amongst the natives. Its life was short, as it gave place to the Recorders Court in 1798.

J. Defects in the Judicial System of 1753

1. Executive ridden : The Government now had the power to appoint and dismiss the Aldermen and therefore the judiciary, both civil and criminal, became very closely connected with the executive. Thus denied the principle i.e. Separation of executive and judiciary. In a scathing criticism of the judicial system Bolt says "That the Mayor's Court has become rather a scourage in the hands of the Governor and Council than an instrument of relief to the injured and justice in Bengal is made so much a political farce, that no one concerned in the administration of it dares so much as to hazard the giving offence to any gentleman in power".

Aldermen, Being too much dependent for their services on the Company, these servants could not be expected to take a detached view in cases in which the Company itself figured as a party.

2. No impartial justice by Mayor's Court : At this time, the Company servants themselves carried on their own private trade and a number of causes thus arose between them and the Indians with whom they entered into various transactions. Even the Mayor and Aldermen had their own trade to care for. The Mayor's Court could not take an unprejudiced view of the matter in which servants of the company happened to be involved. In the words of Ferminger–

"The weakness of the Judicatures of 1726 and 1753 arose from the fact that they tended to be

> in fact but branches of the Company's executive government, and they therefore, afforded imperfect means of resistance to the class interests of the Company's servants at a time when the Company's servants were bidding fair to monopolise the trade of the country".

3. Lack of knowledge of English Law on the Part of the Judges : Another weakness of the judicial system arose from the lack of adequate knowledge on the part of the judges of Mayor's Court, Governor and Council in the intricacies of English law both civil and criminal. As late as 1767 Clive remarked –

> "Calcutta is a place where the profession of law is exercised by men who seem to derive all their knowledge by inheritance, or to possess it by intuition, without previous study or application."

As Kaye also observed -

> "Justice gained little by the establishment of the Mayor's court, for these courts were composed of the Company's mercantile servantsmen of slenderest legal attainments, and the slightest judicial training."

4. Comments of Company's Lawyers : Annual copies of the registers of the proceedings of the courts were submitted to the Company and were scrutinized by its lawyers in England. Thereafter, comments and observations made on the proceedings. Observations related mainly to procedural or technical matters rather than to points of substantive law, and the control was exercised ex-post-facto.

5. No impartial Justice by Criminal Court : The Governor and 5 members of the Council would try a member of the Council or any other servants of the Company in case he was

accused of any crime. It was too much to expect that in such cases the Criminal Court would take a prejudiced view of the matter.

6. Englishmen residing beyond the Presidencies: The territorial jurisdiction of both the civil and criminal courts in a Presidency did not extend beyond its limits and of the factories subordinate to it. However, many Englishmen had come to reside by now in the interior of Bengal beyond Calcutta. But with the weakening of the Nabob's authority, the Englishmen, became immune from the jurisdiction of the local courts. In the words of the Committee of Secrecy –

> "Many of His majesty's subjects, residing in Bengal, were neither under the protection or control of the laws of England, nor amenable to the criminal judicature of the country."

7. Application of English Law on Indians : Application of English Law on Indians resulted injustice as natives had no idea of English law in civil and criminal matters. English criminal laws were much harsh rather than Hindu or Muslim Law.

Evaluation

The Charter of 1753 was definitely inferior to that of 1726, in so far as it deprived the autonomy and independence of the institutions hence it was a retrograde step.

The one redeeming and good feature, however, was the provision for appeals from their decisions to the King in Council as an ultimate court of Appeal. But no appeal actually went to the King-in-Council for long time even after the Charter of 1753, due to huge expenditure of money to pursue appeals before the August body.

Further, redeeming feature was the institution of the Jury for all criminal cases in the Sessions Court for Oyer and Terminer and Gaol Delivery. Only in this way, check on the unlimited powers of the executive government maintained.

K. History after 1773 : In 1772, the House of Commons appointed a Committee of Secrecy to go into the affairs of the Company, it gave an adverse verdict. With the result that in 1773, the Supreme Court was established in place of the Mayor's Court at Calcutta. The Supreme Court was to consist of professional lawyers from England as Judges who were appointed by the Crown and not by the Company. The Supreme Court was thus to be independent from the Company or its government.

In course of time, the Mayor's Courts at Bombay and Madras also gave way to the Supreme Courts of Judicature.

CHAPTER – VI

THE BEGINNING OF THE ADALAT SYSTEM (1772-81)

A. Introduction

The Company had its sway and control on three tiny settlements of Calcutta, Bombay and Madras.

As time passed, the Company expanded its political activities and brought new territories surrounding the Presidency towns under its control. This territory came to be known as the "mofussil" in contradistinction to the "Presidency Towns".

The first territorial acquisition by the Company consisted of Bengal, Bihar and Orissa. Here the first Adalat system was started in 1772 which in course of time, was modified, improved and refined. Later, the adalat system was introduced in the mofussil of Bombay and Madras as well. In fact, Bengal served as a laboratory where experiments were made in the adalat system, and when workable results were obtained, they were transmitted to the Provinces of Bombay and Madras.

Being apprehensive of the growing British power in Bengal, Nawab Siraju-Daula attacked and captured Calcutta, and turned out the British in 1756. The British, however, did not leave Calcutta so easily. Soon they organised an expedition from Madras under the leadership of Clive and recaptured Calcutta in 1757 which was called the Battle of Plassey. The Company thus became supreme in Bengal.

According to Cambridge -

> "But still the Company did not want to assume direct and overt responsibility for administration of Bengal the reasons being first, as it

apprehended that by doing so, it might invite Parliamentary interference in its affairs because of the doctrine of English Constitutional Law that no British subject can acquire sovereignty over any territory for himself; it must vest in the Crown. Secondly, there was a possibility that such a step might arouse the jealousy in the French and the Portuguise and create international complications".

In 1757, it was satisfied by installing its Protege 'Mir Jafar' as the Nawab, who represented the Moghul Emperor, Shah Alam. Mir Jafar could not remain Nawab for long as he soon lost favour with the Calcutta Council. He was replaced by Mir Kasim in 1760. In 1763, again Mir Kashim was replaced by Mir Jafar. In 1765 Jafar was succeeded by his minor son Najm-ud-doula.

In 1765, however, the affairs of the Company in Bengal took a significant turn.

B. Company Becomes the Diwan (Grant of Diwani)

In 1765, the nominal Moghul Emperor, Shah Alam granted to the Company the Diwani of Bengal Bihar and Orissa. The Company agreed to pay annually 26 lakhs of rupees to the Emperor and was to retain whatever surplus might be left out of the revenue collected. The Grant of Diwani gave to the Company a 'de-jure' status in the governmental machinery of the Moghul Emperor. It was merely a fiction adopted to conceal the 'de-facto' position of the Company which already had the real power in Bengal at the time. (Bengal, here means, Bengal, Bihar, Orissa). Under the Moghul Administrative system, the government in the province, then known as the Subah, was conducted by two high

dignitaries, i.e. the Nawab and the 'Diwan'. The Nawab or Nazim was the head of the Government, Military and also supervised the administration of Criminal justice. Being Head of the government and Military, he was responsible for the maintenance of law and order. Thus Nawab was the head of 'Nizamat'.

The Diwan, who stood next to the Nawab in rank, headed the Diwani which comprised the functions of collecting revenue and deciding civil and Revenue cases. Both the officers, Nazim and Diwan were appointed by the Central Government i.e. the Moghul Emperor.

The idea underlying the fragmentation (i.e. division) of administration between the Nawab and the Diwan was to create a system of checks and balances. One had the power of Military without having money; the other had money without having military. Both were to check each other.

Thus, the office of the Diwani, which was granted to the Company in 1765, thus comprised of two main functions namely the collection of land revenue and the administration of civil and revenue justice.

The company wanted to make the Nawab completely innocuous by removing any possibility of trouble from that quarter at any time in future, and thus could be ensured by depriving him of his functions and powers. Consequently, under an agreement with the Company, the nominal Nawab surrendered to it his right to maintain the Army and agreed to accept an annual allowance of 53 lakh rupees for maintenance of himself and of the criminal judicature. At the instance of the Company, the minor Nawab also agreed to entrust the actual administration of whatever functions were left with him, to a deputy Nawab.

With these arrangements, a system of Dual government commenced in Bengal. The Company assumed responsibility for Military, revenue collection and civil and revenue justice. Criminal justice was left to the supervision of the Deputy Nawab and its expenses were to be met out from the Nawab's allowance.

Aitchison puts it as –

> "The Grant of Diwani gave the Company a de-jure status of an official of the Moghul Empire. It was merely a fiction adopted to conceal the de facto position of the Company which already had the real power, in Bengal, at the time".

According to Ilbert –

> "The main object, which was to obtain the substance, though not the name of territorial power, under the fiction of grant from Moghul Emperor, was achieved."

C. Execution of the Diwani Functions

The Company did not at once take over the execution of the Diwani functions after the grant. It did not employ its own servants to discharge these functions. Instead, it appointed two Indian officers, Mohammad Reza Khan at Murshidabad and Raja Shitab Roy at Patna, and the actual administration of the Diwani, was left in their hands. They supervised the collection of land revenue and the dispensation of justice in civil as well as revenue matters.

The system proved ruinous to the country. The Indian officials who had administrative responsibility had no effective power to enforce their decisions against English because they regarded them as real masters. Also these officers had the real power but no responsibility, and accordingly, they exploited

the situation for furthering their own selfish ends to become rich within the shortest possible time.

There was hunger, starvation and misery all around. The unhappy state of affairs was bound to affect the collection of revenue. In 1765, Clive who came to Bengal as Governor described the situation thus :

> "I shall only say that such a scene of anarchy, confusion, bribery and corruption, and extortion was never seen or heard of in any country but Bengal; nor such and so many fortunes acquired in so unjust and rapacious manner".

Keith observed, "The Courts were instruments of power rather than of Justice useless as means of protection, but apt instruments of oppression."

The Company's directors suspected misappropriation on the part of the Indian officers. To reap full advantage of the Diwani, the Company decided in 1772 to 'stand forth as Diwan', and to take over the entire care and management of the Diwani functions and discharge them directly through the agency of its own servants.

The Directors did not issue any method by which their decision to stand forth as Diwan was to be implemented. Thus full responsibility to create an administrative set up, with the Company's servants as the pivot, devolved on Warren Hastings by the Directors. It was out of this scenario that the fabric of a new judicial system in the mofussil was to be woven i.e Adalat System in the mofussil of Bengal, Bihar and Orissa, beyond the presidency town of Calcutta.

D. Judicial System Under the Moghuls

There was a network of Kazi's courts appointed by the government to administer common justice throughout the country in Bengal. At Murshidabad, the seat of the government, there functioned in addition to lower courts a number of central courts viz :

1. Court of the Nawab or the Nazim

The Nawab was the highest officer of the government. It was the highest court for criminal cases.

2. Court of the Diwan

He was the highest financial officer of the government. It was the highest court for revenue and civil cases. He used to hear appeals in civil cases from the lower Courts of the Kazi's.

3. The Daroga -i-Adalat al Alia

In the beginning, this Daroga was merely the Deputy of the Nawab in his Court. With the passage of time, it become impossible for the Nawab, due to many pre-occupations, to attend personally to the judicial work in his court. The Daroga Adalat al-Alia then began to exercise all those judicial functions which appertained to the Nawab.

4. The Daroga -i -Adalat Diwani

He was the Deputy of the Diwan. In course of time, the Diwan ceased to exercise his jurisdiction in person, which then came to be executed by the Daroga. He decided cases relating to revenue and property.

E. The Judicial Plan of 1772

According to M.E. Mowckton Jones –

> "The plan aimed at correcting the defects, without destroying the tradition of local system."

Warren Hasting's administrative plan of 1772 was devised with a district as the unit. Bengal, Bihar and Orissa

were divided into number of districts. In each district, an English servant of the Company was appointed as the Collector who was to be responsible for the collection of Land revenue and had judicial affairs also. The Judicial Plan of 1772 was based on the ancient and traditional division of authority between Nawab & Diwan. Its Chief features were as follows:–

1. Mofussil Diwani Adalat

A mofussil Diwani Adalat was established in each district with the Collector as the judge. The Adalat was authorised to hear and decide all civil causes including real and personal property, inheritance, caste, marriage, debts, disputed accounts, contracts, partnerships and demands of rent. In all suits, the laws of "the Koran with regard to Mohammadans and those of the 'Shaster' with respect to the Hindus" were to be applied i.e. Hindu law and Muslim law were applied respectively.

G.C. Rankin - "In the absence of proper direction, the cases were to be decided according to the doctrine of justice, equity & good conscience.

Therefore, to make the system workable and to enable the collector judge (Englishman) to decide cases according to the Indian Laws, native law officers, Kazis and Pandits, were appointed to expound the laws.

The Decisions of cases upto 500 rupees were final but the cases above Rs. 500 were appealable to Sadar Diwani Adalat.

2. Small Cause Adalat

Provision was made for disputes upto rupees 10 to be decided finally by the Head farmer of the pergunnah (i.e. Village). People having petty cases were thus saved from much trouble and expense involved in travelling long distances from their homes to the district headquarters in quest of justice.

3. Mofussil Fozdari Adalat

A Mofussil fozdari Adalat was established in each district to try all kinds of criminal cases. The Adalat consisted of the Muslim Law Officers, Kazi, Mufti and Moulvies. The moulvies were to expund the Muslim law of crimes; The Kazi and Mufti were to give futwa (i.e. order of sentence) and rendered judgement accordingly.

The Collector was required to exercise a general supervision over the Adalat. He could not finally, determine cases involving sentences of death, or forfeiture of property of the accused; proceedings of such cases had to be submitted to the Sadar Nizamat Adalat for final orders.

4. Sarar Diwani Adalat

Over and above the Mofussil Adalat, the Sadar Diwani Adalat was established at Calcutta. The Sadar Diwani Adalat consisted of the Governor and members of the Council. It was to hear appeals from the Mofussil Diwani Adalats in cases of over five hundred rupees. Appeals were to be filed in the Adalat within two months from the date of the decree given by the Mofussil Adalat.

The Governor and Council exercised a supervisory control on the proceedings of the Sadar Nizamat Adalat.

5. Sadar Nizamat Adalat

The Sadar Nizamat Adalat consisted of an Indian Judge appointed by Nawab known as the Daroga-i-Adalat who was to be assisted by the Chief Kazi, Chief Mufti and three moulvies, was situated at Calcutta. The functions of the Adalat was to revise the proceedings of the mofussil nizamat adalat and approve the sentences of death and forfeiture of property. In case of a death sentence, the death warrant was prepared by the Adalat and was signed by the Nawab as head of Nizamat.

6. Miscellaneous Provisions

All Adalats were to maintain proper registers and records, then district Adalats were to transmit abstracts of their proceedings to the Sadar Adalats. The cases in which cause of action was older than 12 years were not to be actionable. All cases were to be heard in the open court. To supplement the work of the Courts, the method of Arbitration was also provided for. Dacoits on conviction were executed in their villages, were also fined and their families were made slave to the state. The Englishmen disliked mutilation because as the criminal was to become a permanent encumbrance on society. In practice, however, this provision remained a dead letter and was never enforced owing to the resistance shown by the Muslim law officers who would not deviate from the text of the Muslim Law.

F. Evaluation

According to Kaye – "The plan is indeed a credible achievement on the part of the infant administrators"

Functioning of a civil court in each Pergunnah made justice somewhat easily accessible to the people in the countryside. Yet jurisdiction was very limited i.e. upto 10 Rs.

The Nizamat was not in a position to support himself in execution of various orders without the support of the Governor and Council because the military force, was now with the Company and not with the Nawab. Nizamat became dependant upon Governor General in Council. Sadar Nizamat Adalat was shifted from Murshidabad to Calcutta.

A major defect of the scheme was the concentration of too-much power in the hands of the collector who was at once the Administrator, tax Collector, civil judge and supervisor of criminal judicature.

As a collector of revenue he had an interest in revenue cases, but he decided these cases himself and this amounted to his acting as a judge in his own cause.

The matters became very bad due to the collector carrying on his own private trade in the district for his own good and he would thus be tempted to abuse all his powers.

G. Reasons for Granting the Plan of 1774

The collectors enjoyed the privilege of carrying on their private trade. Under these circumstances, there was every possibility that the collectors uncontrolled from any check would monopolize the trade of the country and exercise the vast powers vested in them for their own selfish ends.

Warren Hastings was conscious of this capital defect in the Scheme of 1772. In 1773, the Court of Directors also directed him to withdraw the collectors from the districts and to make some other suitable arrangements. And so in 1774, Warren Hastings introduced a new plan for the collection of revenue and administration of justice.

H. The Plan of 1774 : Features of the plan as follows –

(a) Civil Justice : In this plan, the Collectors were recalled from the districts. An Indian officer, called Diwan or Amil, was appointed in each district in place of the Collector.

The provinces of Bengal, Bihar and Orissa were divided into six divisions, with their headquarters being at Calcutta, Burdwan, Murshidabad, Dinajpore, Dacca and Patna. Each division thus comprised several districts.

In each of these divisions, a small council consisting of four or five English covenanted servants of the Company was appointed, known as the "Provincial Council" and its main function was the collection of the revenue in the Division and to provide justice in revenue cases.

Thus Council was came to be known as "Provincial Court of Appeal". It was authorised to hear appeals in all cases decided by the Amils. In all cases over Rs. 1000 in value a further appeal was to lie from the Provincial Court of Appeal to the Sadar Diwani Adalat. Thus the Provincial Council constituted a link between the Mofussil Diwani Adalats and the Sadar Diwani Adalat.

The Provincial Council was also to decide, as a court of first instance, all civil cases arising within the town where it had its seat.

(b) Criminal Justice : Warren Hastings shifted the Sadar Nizamat Adalat from Calcutta to Murshidabad. The supervision of the Governor and Council on the Adalat came to an end.

As has already been seen, in 1774, collectors had been withdrawn from the districts and so supervision over the district criminal courts manned by the Muslim Law officers also came to an end.

I. Evaluation

In the scheme of 1772, appeals from Mofussil Diwani Adalat lay to the Sadar Diwani Adalat in all cases valued over Rs. 500; now in 1774, all cases decided by amils irrespective of their value were appealable to the Provincial Council.

In the scheme of 1772, "Supervision" was created over the district courts and Sadar Courts but the scheme of 1774 lost the "Supervision".

J. Reasons for Granting the Plan of 1780

The 'Patna cause' had revealed that a very unsatisfactory state of affairs prevailed in the company's courts in the mofussil of Bengal, Bihar and Orissa. The function of administering justice was mainly discharged by six Provincial

Councils, who were also responsible for the collection of revenue under the plan of 1774. The Council, as a rule, devoted much of their time to the revenue work. They attached only a secondary importance to the function of administering justice. The English Gentleman, composing these Councils, were ignorant of the native laws, language and customs. The Provincial Councils had left the task of deciding cases practically in the hands of the native law officers attached to them for the purpose of expounding the indigeneous systems of law. The manifold defects and the essential weaknesses of the system pressed that the system in operation must be thoroughly overhauled and completely renovated.

K. The Judicial Plan 1780 : Separation between Executive and Judiciary

Warren Hastings formulated a new plan, its basic feature was separation between the revenue and judicial functions which was promulgated in 1780. The salient features of the new plan were :–

In each of the six divisions i.e. Calcutta, Murshidabad, Burdwan, Dacca , Dinajpore and Patna, in which the three provinces of Bengal, Bihar and Orissa had been divided in 1774, a Court of Diwani Adalat (i.e. a court of civil jurisdiction) was established. Each of the six new Diwani Adalats were to be presided over by an Englishman, a covenanted servant of the Company. He was to be known as the 'Superintendent of the mofussil Diwani Adalat.'

The Six Provincial Councils established in the year 1774 in the six divisions, were continued. They were however, divested of their civil - judicial functions. After 1780 the Provincial Councils were to confine themselves only to revenue functions viz., the collection of revenue in the

respective division as also to decide cases arising out of the revenue administration.

The jurisdiction of the Superintendent of the Diwani Adalat was to be distinct, and independent from the Provincial Council of the Division. The basic feature was separation between the revenue and the judicial functions, in other words executive and judiciary. The Diwani Adalat was to sit at least three times a week.

The Diwani Adalat was empowered to decide all civil causes like inheritance, property, contract etc. The Superintendent of the Diwani Adalat could refer small cases not exceeding one hundred rupees in value, to some Zemindar or public officer residing near the parties's place of residence. The Adalat was authorised to decide even cases of inheritance and succession to Zemindaries and talukdaries, which till now had fallen within the purview of the Governor General and Council. As to the law, the system of 1772 was continued. The Adalat was enjoined to keep regular and proper records of all its proceedings.

All decisions of the Diwani Adalat were to be final in cases where the value of subject matter do not exceed one thousand rupees. In case of over valued an appeal lay to the Sadar Diwani Adalat situated at Calcutta and composed of the Governor General and Council.

For the first time, the Government in 1780 levied court fees on the suitors. The scale of fees varied with the value of the subject matter involved in a particular suit, the maximum being 5% and the minimum, 2%.

According to Ferminger - "Provisions regarding the oath to be taken by the superintendents of Diwani Adalats, maintenance of records of proceeding, reservation of personal laws,

appointments of native law officers and the like were almost the same, as those made in 1772".

L. Evaluation of the New Scheme

The chief merit of the new judicial plan was the separation between Judiciary and Executive. The newly established courts of Diwani Adalats were to be purely judicial tribunals. The executive functions like the collection of revenue etc. were left in the hands of the Provincial Councils. For the first time such a bifurcation of functions was effected. But still the Provincial Council had jurisdiction in deciding revenue cases.

Most conspicuous defect was the paucity of courts to administer justice in civil cases. In such a vast area as the three provinces of Bengal, Bihar and Orissa, there were only six Courts of Diwani Adalats. Each Adalat thus had very vide territorial jurisdiction. This put the people to great inconvenience and trouble, because they had to travel long distances to reach the Divisional Headquarters – the seat of the Adalat.

The judicial plan of 1780 had endeavoured to solve these difficulties by providing that cases, not exceeding Rs. 100/- in value, might be referred by the Superintendent of the Diwani Adalat to some Zeminder or public officer residing near the place where the cause of action actually arose. But even this arrangement did not afford any substantial relief to the poor-people in so far as they had to come, at least once, to the Divisional Headquarters to file the suits in the Adalat.

Moreover, the Zemindars to whom suits of small value were referred for decision under this arrangement, were to act as honorary judges without receiving any fee or remuneration

for their labours. There was thus a danger of the Zemindars misusing their judicial powers to their own selfish ends.

The arrangement was objectionable due to appointing a man as judge in his own cause. A person having a complaint against a revenue authority had to go to the concerned Council for redress which already being interested in collection of revenue.

M. Impey Appointed to the Sadar Diwani Adalat

In October, 1780, the Governor-General and Council divested themselves of the charge of the Sadar Diwani Adalat and appointed Sir Elijah Impey the then chief justice of the Supreme Court, as its sole judge. This step was taken mainly on the initiative of Warren Hastings. Many factors below mentioned led to these developments :–

N. Reasons for Appointment

Hitherto, the Sadar Diwani Adalat was composed of the Governor General and members of the Council. These persons were saddled with multifariours other responsibilities. They could not, on that account, devote the requisite time to their judicial functions in the Sadar Adalat. The sittings of the Court were, therefore, very irregular as found in famous 'Patna case.'

Further, the Governor-General and members of the Council were non-lawyers and so had neither the inclination nor the capacity to perform the complex judicial duties in the Sadar Diwani Adalat. The Sadar Diwani Adalat was to hear appeals from the lower courts, but more so, it was to exercise a close supervision over the lower courts in order to ensure their proper and regular functioning.

Ferminger observed – "The Governor-General and the Councillors were non lawyers. Impey being an

experienced and trained lawyer was expected to discharge judicial functions in a far better way."

Further the appointment of Impey, the Chief Justice of Supreme Court of Judicature, as the judge of the Sadar Diwani Court was expected to provide a connecting link between the two rival judicial systems i.e. The Supreme Court and Sadar Diwani Adalat.

Some Council members expressed doubts about the advisability of the scheme. It was said that it shall cause danger to the independence of the Supreme Court. It was also feared that such a step might led to an introduction of English Law in the mofussil. Inspite of these misgivings, the proposal of Warren Hastings was accepted in the Council by his casting vote.

Impey took over charge of the Sadar Diwani Adalat in 1780. He enthusiastically set in hand the work of re-organising and revitalising the Company's judicature. Within a very short time, he compiled a set of regulations, a sort of a civil code, which was a collection and a digest of all the previous regulations, with a number of additions, necessary modifications and changes. The code came into force in 1781 and put into operation a refined scheme to administer justice in the country side.

O. Scheme of 1781

Impey in his scheme of 1781, sought to mitigate the evils arising out of the paucity of the Courts of Diwani Adalat in the country. Impey in 1781 increased the number of courts from six to eighteen. The important feature of the scheme of 1780, i.e., the separation between the judicial and the revenue functions, was retained.

The judge of the Diwani Adalat was authorised to refer for decision all cases involving a subject matter valuing upto Rs. 100/- to some Zemindar or public officer. In such cases the arbitrator was to report his award to the judge of the Diwani Adalat, who could approve, disapprove or alter it. Additionally, provision was made for reference by the Adalat of cases upto Rs. 200 to a munsiff attached to the Adalat. The Adalat had final authority to prove, disapprove or alter the award.

Further, it was provided by a section of the Regulation of 1781 that, 'In all cases, within the jurisdiction of the Mofussil Diwani Adalats, for which no specific directions are hereby given, the respective judges thereof do act according to justice, equity and good conscience. Similarly, another section provided, 'that in all cases, for which no specific directions are hereby given, the judge of the Sadar Diwani Adalat do act according to justice, equity and good conscience.

Impey as Chief Justice of the Supreme Court had occasion to render judgement in the famous Patna Case, which revealed that the judges of the Diwani Adalats usually left the actual decision of the cases in the hands of the native law officers. So now it was made clear that the question of fact in every case must be decided by the judge himself. The opinion of Moulvies or Pandits was to be sought only after the fact had been decided by the judge. The native law officers were to confine themselves only to the function of expounding the law on the basis of the facts decided by the judge.

The Patna Cause had also revealed that the Sadar Diwani Adalat functioned very irregularly and ineffectively. To make the Sadar Adalat more lively and active an institution, Impey was appointed as its sole judge. Its functions, powers

and jurisdiction were more clearly defined. The Sadar Diwani Adalat was to perform the following functions:–

1.Appellate jurisdiction:– Primary function of the court (i.e. Sadar Diwani Adalat) was to hear appeals from the lower courts in all cases where the subject matter involved was over one thousand rupees in value.

2. Original Jurisdiction : The court was authorised to try and determine any cause or matter of civil nature referered to it by the Governor General and Council.

3. Control & Superintendence : The Sadar Court was to exercise control and supervision over the lower Diwani Adalats. It was authorised to receive any original complaint, cognisable by a lower court but neglected or refused by it to entertain. The Sadar Adalat was to refer such a cause to the Mofussil Diwani Adalat requiring it to try expeditiously.

On a report of misconduct against a judge of the Mofussil Diwani Adalat, the Sadar Diwani Adalat was empowered to suspend the judge and report the matter to the Governor General and Council for final decision.

> According to Stephen – "In a way, the Sadar Diwani Adalat was not only to confine itself to hearing appeals but also to act as a watch dog over the whole of the Company's judicial system"

Impey compiled a comprehensive civil procedure code for the guidance of the Sadar Adalat and the Mofussil Diwani Adalats. It was the first code of civil procedure to be prepared in India. The code contained 'ninety five clauses'.

> Ferminger opined – "The code was an extraordinary contribution giving new direction to judges of Diwani Adalats and litigants. Its compilation was the first

attempt of its kind in India and it made the law of civil procedure, certain to some extent."

P. Recall of Impey

Impey's association with the Sadar Diwani Adalat as its sole judge was found to be very beneficial and advantageous to the Company's judicial system.

But unfortunately, Impey's connection with the Sadar Adalat was stopped very early. He had to lose both his chief judgeship of the Supreme Court as well as the judgeship of the Sadar Adalat. His appointment to the Sadar Diwani Adalat was viewed with disfavour in England. As the Chief Judge of the Supreme Court, he received a salary from the Government. The Government at Fort William further granted him an additional sumptuous (i.e. splendid) salary of Rs.5000/- per month for his labour as the judge of the Sadar Diwani Adalat. People came to look down this arrangement as a sort of bribe, offered by the Company to the Chief Justice of the Supreme Court to placate him so that the friction, that had unfortunately arisen between the Supreme Court and the Supreme Government at Calcutta might be eased.

Further, the Chief Justice held the office at the sufferance of the Company's Government at Calcutta. If the Council happened to be dissatisfied with his functions in that office, it could dismiss him. Thus as a judge of the Sadar Adalat, he was subject to the control of the Council. Impey's appointment at the Sadar Adalat negatived the basic policy of the Regulating Act, which was to erect a court to control, the British subjects and Company's servants in Bengal, Bihar and Orissa. Thus Impey gave death blow to the independence of the Supreme Court.

Consequently, in 1782, Impey left India for England, and the Sadar Diwani Adalat lapsed again into the hands of the Governor-General and Council.

In 1782, this policy was wrecked but later in 1861. The same policy asserted itself and led to the creation of High Court.

According to Stephen – "Hastings, in short, foresaw and laid the foundation of the policy in which Indian legislature was put under the direction of legal member of the council and by which the superintendence of the Mofussil Courts and an appellate jurisdiction over them were vested in the High Court".

Q. Reforms in Criminal Judicature

As already pointed out, Hastings in 1772 established the Court of Sadar Nizamat Adalat at Calcutta. It consisted of a Muslim Judge, with the title of Daroga, who was assisted by the Mohammedan law officers Kazi, Mufti and Moulvies. Its functioning was supervised by the Governor General, Warren Hastings.

In 1774, the Supreme Court of Judicature was established at Calcutta. Apprehending interference from the Supreme Court into the affairs of the Sadar Nizamat Adalat, the Government of Calcutta decided to change its venue. In 1775, therefore, the Sadar Nizamat Adalat was shifted from Calcutta to Murshidabad and was placed directly in the charge of the Nawab. The Naib Nawab, Mohd. Reza Khan was to look after the working of the Sadar Nizamat Adalat. In 1775, therefore, the whole of the criminal judicature in the country lapsed into the hands of the Reza Khan.

Reza Khan's supervision over the working of the criminal courts was very weak and ineffective. Innocent

persons were punished whereas the guilty escaped with impunity. In 1781, Hastings directed his attention to this sorry state of Affairs and introduced following reforms in the sphere of criminal law and justice:–

The Plan of 1781: In the first place, Warren Hastings devised a machinery to arrest and apprehend criminals and bring them to the criminal courts for trials. For this purpose, the judges of the Mofussil Diwani Adalats were appointed as Magistrates also. They were to arrest all those persons who were suspected of having committed crimes, and were to send them for their trial at the nearest Mofussil Fozdary Adalat. No Magistrate was to have any judicial powers i.e. he could not try the accused himself. Thus the Magistrates were given the police duty only. The step was expected to promote law and order in the countryside.

To keep a watch over the general administration of criminal justice and the functioning of the Criminal Courts in the country, Hastings created a new Department at Calcutta. The department was to receive reports and returns of the proceedings of all Fozdary Courts. The Magistrates were to send monthly reports to this Department showing the number of persons arrested, charges laid against them and the persons sent by them for trial to the Fozdary Courts.

The Mofussil Fozdary courts were to transmit monthly reports showing the number of persons in actual confinement, persons arrested, persons released, and the persons tried and the sentences awarded to them. Similar reports were to be transmitted by the Sadar Nizamat Adalat, which continued to sit at Murshidabad. The Head of this new department at the Capital was to be a covenanted servant of the company and was to be known as the 'Remembrancer of Criminal Courts'.

He was to have charge of all the reports sent to him by the various Fozdary Courts and the Magistrates. He was to analyse these reports, prepare extracts from them and arrange them in some proper order. Whenever any case of extreme injustice came to his notice, he would draw attention of the Governor General to it and the Government might then direct the Remembrancer to write to the Naib Nazim to take steps to set things right and to see that such things did not reoccur. In this way Warren Hastings sought to introduce a system of control and supervision over the administration of criminal justice in the country.

The system was hardly comprehensive or effective. The Remembrancer had to depend on information given in the reports furnished to him by the Courts for searching the truth. The reports hardly revealed a true state of affairs. It was not difficult for the Mofussil Fozdary Adalats to manipulate the reports so as to give a more favourable picture of the state of affairs prevailing therein. Warren Hastings left India in 1785.

It was only in 1790 that Cornwallis finally buried the myth of the Nawab and took over the administration of criminal justice in the same way as Warren Hastings had done in 1772 with respect to civil justice.

R. Contribution

The contribution of Warren Hastings was described by Lord Macaulay – "Hasting's internal administration with all its blemishes, gives him a title to be considered as one of the most remarkable men in History".

CHAPTER -VII

THE SUPREME COURT AT CALCUTTA

A. Introduction

A realisation was dawning on the politicians that company was not mere commercial body but has assumed the character of political and territorial power. As Burke said – "The East India Company did not seem to be merely a company for the extension of British Commerce, but in reality a delegation of the whole power and sovereignty of this kingdom sent into the East."

From 1767, it was also required to pay a tribute of four lakh pounds every year to the British Exchequer in consideration of its retaining its territorial acquisitions and revenues. According to Ilbert – "This was the State's share of the Indian spoil". The servants had a right to carry private trade. Thus, they acquired great fortunes and were called 'Naboobs' by Britishers. Due to its financial embarrassments, the Company had to beg the British Government for a loan. In the prevailing atmosphere, the British Government could not possibly accept the Company's request for a loan without a probe into its affairs. A Select Committee and a Secret Committee were therefore, appointed by the House of Commons for this purpose.

In a number of reports, they pointed out the various defects and shortcomings existing in the structure of the Company, its government at Calcutta and the judicial-system existing there. All these circumstances led the Parliament to enact the Regulating Act in 1773. This Act modified the constitution of the Company, changed the structure of the

government at Fort William and Bengal, and established the Supreme Court of judicature at Fort William.

B. Regulating Act 1773

1. Amendment in the Constitution of the Company

The Act of 1773 effected two major changes in the constitution of the Company.

First, on the eve of the passage of the Regulating Act, the affairs of the Company in England were regulated by the Court of twenty-four Directors, all of whom were elected every year by the Court of Proprietors, or the General Court of the Shareholders. Under the new arrangements, only one fourth of the Directors i.e. six in number, were to retire in rotation every year. The Directors, therefore, were to hold office for four years. The change was made for efficiency.

Secondly, the Act restricted the voting power only to those shareholders who had a stock of £ 1000 instead of £ 500 as theretofore. It was thought that it would result in improving the quality of the shareholders and accordingly of the directors.

2. The Government of Bengal

The Act introduced certain changes in the administrative system of the Presidency of Calcutta and the Diwani Provinces of Bengal, Bihar and Orissa.

The town of Calcutta was regarded as the 'British Settlement' so the inhabitants of Calcutta were regarded as the subjects of the British Crown, whereas the inhabitants of Bengal, Bihar and Orissa beyond Calcutta were considered to be the subjects of the Mughal Emperor and his representative, the Nawab of Bengal. For the purpose of administration of Calcutta and the Presidency of Fort William, the Act appointed a Governor General and a Council of four persons. The whole civil and Military government of the Presidency was to be

vested in this body. The same day was also to be responsible for the 'Ordering, management, governing of all territorial acquisitions and revenues in the kingdoms of Bengal, Bihar and Orissa (Mofussil) area.

Warren Hastings was appointed as the first Governor General. Three out of the four members of the Council were despatched to India from England. Each one of them was to hold office for five years but could be removed earlier by the King on the recommendations of the court of Directors. All the decisions in the council were to be arrived at by a majority of votes. The Governor General did not have 'Veto' power to defeat the majority. It was in 1786 when Lord Cornwallis was appointed as the Governor-General of India, and thereafter the Governor-General got the power to override his Council in case of necessity.

Hitherto, the three Presidencies had enjoyed a status independent of each other. Each had a direct relation with the Court of Directors in England. Regulating Act 1773 put the Presidencies of Madras and Bombay under the superintendence and control of the Calcutta Presidency in matters of 'War and Peace', subject however to two exceptions, viz., the Subordinate Presidencies could commence war or negotiate peace if there was 'imminent necessity' as would render postponement of war dangerous or if the Presidencies received orders directly from the Court of Directors to the effect. The Subordinate Presidencies were required to transmit regularly to the Governor-General of Calcutta Presidency information regarding all transactions relating to the government, revenues or interests of the Company. Thus, the Regulating Act took the first step in the direction of Administrative centralisation in India.

3. The Supreme Court

Perhaps, the most remarkable clauses of the Regulating Act were those which provided for the creation of the Supreme Court of judicature at Calcutta in lieu of the Mayor's Court, functioning there under the Charter of 1753. The Act empowered the Crown to establish the Supreme Court at Calcutta by a royal Charter. The Act specified the lines on which this Charter was to be based. The Court was to consist of a Chief Justice and three puisne judges to be appointed by the Crown and holding office during its pleasure. Only a Barrister of at least five year's standing could be appointed as judge.

The Court was to be a Court of Record. The Supreme Court was to enjoy a very wide jurisdiction. It was authorised to administer justice in civil cases. It was authorised to administer justice in criminal cases in the character of a 'Court of Oyer and Terminer and Gaol Delivery' for Calcutta, the factory of Fort William and the factories subordinate thereto. It was to use grand jury as well as petty jury. The Court was further empowered to exercise Admiralty and Ecclesiastical jurisdiction.

The jurisdiction of the Court was not to extend to all persons in Bengal, Bihar and Orissa. It was restricted to only a few defined categories of persons, viz.,

(a) All British subjects residing in Bengal, Bihar and Orissa;

(b) All of his Majesty's subjects residing in Bengal, Bihar and Orissa;

(c) All persons employed by or directly or indirectly in the service of, the Company or any of His Majesty's subjects;

(d) An inhabitant of Bengal, Bihar and Orissa could voluntarily assume, under a written contract with a subject of

his Majesty, the Court's jurisdiction in a dispute exceeding five hundred rupees. In such a situation, the matter could come before the Supreme Court either in the first instance, or on appeal from the sentence or order of any other court.

The Supreme Court was declared to be ineligible to hear and try any indictment or information against the Governor General or any member of the Council in any case except Treason or Felony. The Governor-General, members of the Council, and the judges of the Supreme Court were to be immune from arrest or imprisonment at the hands of the Supreme Court. All these persons were also made justices of the peace and were authorised to hold quarter sessions within the Settlement of Fort William.

The Act laid down that the charter establishing the Supreme Court would make provisions for allowing appeals from the court's decisions to the King-in-Council under such conditions and circumstances as were thought reasonable and proper by the Crown.

The Act laid down that if and when the Crown issued the charter to establish the Supreme Court at Fort William, so much of the Charter of 1753 as related to the Mayor's Court and the Criminal courts at Calcutta, would come to an end. In all other respects, however, that charter was to continue in operation and be of full force.

4. Legislative Authority

The Regulating Act changed in a significant manner the legislative procedure introduced in Calcutta by the Charter of 1726 and the Charter of 1753.

The Governor General and Council were now authorised to make such rules, regulations and ordinances for the good government of the Settlement of Fort William and

factories subordinate to it, "as shall be deemed just and reasonable". This legislative power was to be subject to three restrictions, viz., (1) the rules framed were not to be repugnant to the Laws of England; (2) they were to be reasonable and were to impose reasonable penalties for their breach ; and (3) the rules were not to be effective until they were registered and published in the Supreme Court.

Any person in India could file appeal against any such rule, within sixty-days of its registration in the Supreme Court, to the King-in-Council who could set aside or repeal the rule if it thought fit. Such an appeal had to be lodged in the Supreme Court at Calcutta within the stipulated time so that it could be sent to King in Council.

The copies of all the rules made by the Governor General and Council had to be sent to Secretary of State in England. Any person in England could file appeal to the King in Council against such a rule within 60 days after its publication there.

The King-in-Council could, suo-motu, without any appeal from anyone, disapprove or disallow any such rule within a period of two years from the date of its passage by the Governor General and Council.

In this way, the Veto over legislation which had been vested in the directors under the Charter of 1726 was now transferred to the Supreme Court, in the first instance, and ultimately to the King-in-Council.

The new procedure was designed to obviate the long delays which were necessarily involved in securing consent of the Company's Directors from England to any proposed piece of legislation. At the same time, in the Supreme Court, an effective check on hasty legislation was also provided for.

5. Miscellaneous Provisions

The Governor General, members of the Council, Judges of the Supreme Court and officers engaged in collection of revenue were prohibited from receiving 'presents' or engaging in 'private trade'.

The Court of King's Bench in England was empowered to punish offences, crimes, or misdemeanours committed against any of His Majesty's subjects or any inhabitant of India by the Governor-General, members of the Council, Governor, any judge in any Court in the Company's settlements or any person employed by the Company.

C. Establishment of the Supreme Court by Royal Charter, 1774

To give effect to the express provisions of the Regulating Act, the King of England, George III, issued a Royal Charter on March 26, 1774 establishing the Supreme Court of judicature at Fort William in Bengal. And made it a 'Court of Record'.

The Charter appointed Sir Elijah Impey as the Chief Justice, and Robert Chambers, Stephen Caesar Le Maistre, John Hyde as the three Puisne Judges of the Supreme Court. All the four were barristers of England of at least five years' standing.

The Supreme Court, in the first place, was to have power and jurisdiction to hear, try and determine all civil causes, actions and suits, arising against:

(a) The Mayor and Aldermen of Calcutta (corporation);

(b) Any of His Majesty's subjects residing within the provinces of Bengal, Bihar and Orissa;

(c) Any person, who was employed by, or directly or indirectly in the service of,

(i) The Company ; (ii) The Corporation of Calcutta, or

(iii) Any of His Majesty's subjects;

(d) The Company ; and

(e) Any inhabitant of Bengal, Bihar and Orissa, if he entered into any contract or agreement in writing in which the other party to such a contract was His Majesty's subject. The cause of action exceeded five hundred rupees and the Indian inhabitants in this contract agreed that in case of dispute, the matter would be determined by the Supreme Court of Judicature at Fort William.

This Court could hear the matter either in the first instance, or by way of appeal from the decision of a Company's Court.

The Supreme Court, in the second place, was to be a Court of Equity, and as such was to have full power and authority to administer justice as nearly as may be, according to the rules and proceedings of the 'High Court of Chancery' in Great Britain.

The Charter vested the Supreme Court, with criminal jurisdiction also. The Supreme Court was to be a 'Court of Oyer and Terminer and Gaol Delivery', in and for the town of Calcutta, and the factories subordinate thereto. In this capacity, it was to have the same powers and authority, as the court of Oyer and Terminer and Gaol Delivery had or exercised in England. The Court was to use grand jury and petty jury, composed of the subjects of Great Britain residing in the town of Calcutta. The Court was further authorised to hear, determine and judge all crimes committed in the provinces of Bengal, Bihar and Orissa by :–

(a) Any of His Majesty's subjects; and

(b) Any person employed by, or being directly or indirectly in the service of the Company, or any of His Majesty's subjects.

The Supreme Court, was empowered to Exercise Ecclesiastical jurisdiction throughout the provinces of Bengal, Bihar and Orissa, on the British subjects residing there. As such, the Court could grant probates of wills and testaments of the British subjects dying within the three provinces of the Bengal Bihar and Orissa. It could issue letter of administration for the effects of the British subject dying intestate or dying without appointing an executor to his will. The Charter authorised and empowered the Supreme Court to appoint guardians and keepers for infants and their estates and also guardians and keepers of insane persons according to the rules prevalent in England.

The Supreme Court was further constituted into a 'Court of Admiralty'. This maritime jurisdiction was to extend to His Majesty's subjects residing in Bengal, Bihar and Orissa and persons directly or indirectly in the service of the Company or any of His Majesty's subjects. The Court was thus to hear and try all cases, civil and maritime in the same way as the Admiralty used to do in England.

The Regulating Act, as noted above had appointed the Governor General and members of the Council, and the judges of the Supreme Court as justices of the Peace, and authorised them to hold Quarter Sessions. With an idea to ensure that the Court of Requests and the justices of the Peace, and the Court of Quarter Sessions (to be held by the justices of the Peace) might answer better, the Charter empowered the Supreme Court, as a Superior Court to superintend and control over the

above mentioned courts, to issue various prerogative writs like Mandamus, Certiorari, Procedendo, Error and Habeas Corpus.

The Charter defined the conditions in which appeals from the decisions of the Supreme Court were to lie to the King in Council.

(a) In civil cases, appeals could be made with the permission of the Supreme Court itself. The petition seeking the requisite permission was to be presented to the Supreme Court within six months from the day of its pronouncing the judgement. Appeals could lie only if the subject-matter involved in the dispute exceeded one thousand pagodas.

(b) In criminal cases, the Supreme Court was also to have full power and absolute discretion to allow or deny the permission to make an appeal to the King in Council from its decision.

According to Archbold – "The right to refuse or admit an appeal upon terms and conditions prescribed by the King in Council was reserved to it."

(c) Besides, the King in Council reserved the right, in a special case, to refuse or admit an appeal from any judgement, decree or order of the Supreme Court, upon such terms and conditions, as they thought fit.

The Charter granted to the Supreme Court a power to reprieve or suspend the execution of any capital sentence. In such cases, if the Supreme Court thought that there was a proper occasion for mercy, then it could suspend the execution of the death sentence, transmit to the King in Council all the relevant record along with the reasons for recommending the criminal to mercy, and await the pleasure of the King.

The Supreme Court was empowered to admit such and so many Advocates and Attorneys as it thought proper. Only such persons were to appear and plead before the court who were admitted. On reasonable cause, the Court was authorised to remove any of them from the rolls.

The Supreme Court was to supersede the Mayor's Court and the Court of Oyer and terminer and Gaol Delivery composed of the Governor and Council working under the Charter of 1753. The Supreme Court did not however, abolish the Court of Requests established at Calcutta by the Charter of 1753. Thus they continued to function.

The Judges of the Supreme Court were to have the same jurisdiction and authority as the justices of the Court of King's Bench in England.

D. Merits and Demerits of the Supreme Court

I. Merits

The Supreme Court was a great improvement on its predecessor, the Mayor's Court and the Court of Oyer and Terminer and Gaol Delivery existing at Calcutta under the Royal Charter of 1753.

The Mayor's Court had authority to try causes in which the Company itself was a party. But such trials were vitiated by the fact that the judges who composed the Mayor's Court were removable at the discretion of the Governor and Council. The Court of Oyer and terminer and Goal Delivery, composed of the functionaries of the Company appointed in Calcutta, was an insufficient deterrent to wrong doing on the part of the Company's officials. On the other hand the Supreme Court's Judges being appointed, by His Majesty and they were to hold the office during His Majesty's pleasure. Thus it was able to

take dispassionate view of the cases in which either the Company or its servants happened to be involved.

The Judges of the Mayor's Court were supposed to act under the English Law, of which they were largely ignorant. The Supreme Court was to consist of professional lawyers as Judges.

The Judges of the Supreme Court were empowered to issue the prerogative writs. The Mayor's Court lacked such power.

The Supreme Court was to consist of both the Common Law and the Equity Jurisdictions. In this respect, the Supreme Court can be regarded as an improvement even on the judicial system of England, where the Common Law and the Equity, constituted two separate, distinct and independent jurisdiction. The Supreme Court may even be regarded as the precursor of the Judicature Act of 1873, by which Common Law and Equity came to be administered by one and the same Court in England.

The Supreme Court had combined jurisdiction of the Admiralty and Ecclesiastical courts. In England, all these functions were discharged by distinct courts. From this point of view also the Supreme Court may be regarded as the precursor of the Judicature Act 1873 of England.

> According to Potter – "The Regulating Act was a precursor of the Judicature Act, 1873 by which all the separate courts in England were merged into one and the same court which came to administer all the various jurisdictions."

II. Demerits

The reasons of defects in the functioning of Supreme Court was expressed by P.E. Robert – "Though the aims and

objects of the framers of the Regulating Act were very good, many defects came to light subsequently. They were either due to the inexperience of the policy makers in Indian affairs or due to the defective drafting of the provisions of the Act".

Consequent upon the establishment of the Supreme Court of Judicature at Calcutta, Bengal witnessed a spell of struggle between the Government, on the one hand, and the Supreme Court, on the other, due to many ambiguities, defects and vaguenesses existing in the Regulating Act and also the Charter issued under it to create the Court.

The Supreme Court's jurisdiction was extended beyond Calcutta though in a restricted degree and only over specified categories of persons. This gave rise to the difficulties that were experienced later i.e. it became difficult to know that who are that specified categories of persons.

The Court was given a wide jurisdiction in all matters civil and criminal . The Court was to exercise this jurisdiction over a few specified categories of persons, viz. British subjects, subjects of His Majesty, persons employed by, or being directly or indirectly in the service of the Company or any of His Majesty's subjects, and an Indian inhabitant when he placed himself voluntarily in the circumstances detailed above. So it is not clear as to who were the persons intended to be included in the term, wherein lay the distinction between the British subjects and subjects of His Majesty's. Calcutta was regarded as British territory, and therefore, its inhabitants were regarded as British subjects and also the subjects of His Majesty. The term British subjects was perhaps used to denote persons who were the natural born subjects of His Majesty. The term His Majesty's subjects, probably denoted those

subjects of His Majesty who were not natural born British subjects like the Canadians, Australians etc.

The Regulating Act vested in the Governor General and Council, the powers of 'the whole civil and military government of the said presidency of Calcutta' and also the ordering, management and government of the territorial acquisitions and revenues of the kingdom of Bengal, Bihar and Orissa. The Supreme Court on the other hand, was to enjoy 'full power and authority to hear and determine all complaints whatsoever against any of His Majesty's subjects for any crime, misdemeanour or oppression and also to entertain, hear and determine any suit or action whatsoever against any of His Majesty's subjects in Bengal, Bihar and Orissa. Thus struggle begun due to two independent bodies because it was not clear as to which was to prevail if any sort of conflict arises between the two. Opposite to political map, Bengal, Bihar and Orissa were regarded as British territory and then to allow the Supreme Court's writs, drawn under the authority and in the name of the King of England, to run in that area was a great anomaly, which created confusion and doubts.

Was or was not the Company in relation to its actions as Diwan, subject to the jurisdiction of the Court? This was the question which was left unanswered by the Act and the Charter. It was a very notorious fact that the worst of oppressions were committed by the servants of the Company in the sphere of collection of revenue. The Supreme Court was avowedly instituted with an idea to prevent the servants of the Company, employed in the collection of revenues, from indulging in corrupt and oppressive practices. With the achieving of above idea, there were many express provisions which showed that the Act sought to establish an impartial

court's control over the vagaries and excesses of the Company's servants. The expressions "..... person who were employed by or were directly or indirectly, in the service of the Company", were the express provisions and so the Court was entitled to take cognisance of all civil and criminal cases in which the servants of the Company were involved either in their private or public capacities. Bitterly as this was resented, the rights of the court in this direction were very clear and specific.

The jurisdiction of the Supreme Court extended over all those persons who were employed by the Company, or were in its service 'directly or indirectly'. What actually was the meaning of the term 'employment' or 'service', was not very clear. Did it cover the Indian Zemindars, farmers of revenue, who were responsible for the collection of revenue on commission basis? The point was far from being clear. The Supreme Court's contention was affirmative as the Indian officers, being indirectly in the service. But the Governor and Council denied the contention.

With the passage of the Regulating Act, there came into existence two distinct and independent judicial systems in Bengal. First the Supreme Court and secondly, Company's judicial system (Adalat System). The Regulating Act did not specify as to what would be the relations between the two systems, the Crown's and the Company's Courts It was very necessary for the Act and the Charter to contain some carefully drawn clauses safeguarding the jurisdictions of the Company's Adalats.

It was not clear whether the Supreme Court could or could not take into cognisance of any matter against the judges of the Company's Courts for any act of illegality or corruption

committed by them in the discharge of their judicial functions. And also, whether the native law officers, Kazis and Pandits, comes under the Supreme Court's jurisdiction? Also whether the Judges and native law officers in the Company's courts are servants of the Company? The Supreme Court therefore, took the view that it could try actions against the judicial officers of the Company for acts done in the execution of their public functions. But the Council did not like it. The dispute on the point culminated in the famous Patna Cause.

Beyond Calcutta, the Supreme Court was to exercise jurisdiction over only a few specified categories of persons. If a case was brought in the Court against someone, how was it to be proved whether he was under its jurisdiction or not? The Supreme Court took the view that when an action was brought against a person, he should appear before it and plead to its jurisdiction, and then only the court could decide whether his objection was valid or invalid. This meant that every Indian inhabitant of Bengal, Bihar and Orissa was subject to the Court's jurisdiction to the extent of his appearing before the Court and pleading to its jurisdiction. If ever a case was brought and a writ served on him, every person, even though he had to take the preliminary objection only, had to employ an English barrister at a heavy cost. Besides, the long distance he had to travel from his residence to Calcutta. The Supreme Court was completely out of harmony with their mode of life, traditions and manners. Its procedure was a very technical affair, it being based on the ordinary English Procedure in civil actions based on Common Law. A very objectionable and embarrassing feature of this procedure was 'arrest on mesne process'. On a case being filed and the plaintiff swearing an affidavit showing that the person complained of was subject to

the Court's jurisdiction, the Court proceeded to issue a 'writ of capias' ordering arrest of the defendant with a provision to release him on bail. The Court took this preliminary step even though it later held that he was not subject to its jurisdiction. Usually, the amount of bail was fixed at a high figure which was beyond the capacity of the Indians to furnish. If bail is not taken, then he would be kept in confinement till his case was finally disposed of.

According to Stephen – "Arrest on Mesne process" was beyond all questions of the worst and most apprehensive point of the law of England and its introduction into India was indefensible."

Macaulay observed - "The rule of the Supreme Court to insist appearance, in every case proved a "reign of terror".

The Regulating Act left wholly untouched the question of the nature of the law to be administered in the Supreme Court. The Supreme Court had been created on the foundations of the Mayor's Court, which was a court of English Law. It followed, therefore, that the Supreme Court was also to administer English Law.

Further, it could not be the whole of the English Law which the Court was to apply, but only those portions of it which suited the Indian conditions. Nobody could be sure whether a particular rule of English Law was applicable to the Presidency or not, until and unless the matter came before the Court for its decision on the suitability of the law to the Indian conditions. Confusion about the law to be administered by the Supreme Court did not end here. According to the theory of the English Constitutional law English Law was introduced into Calcutta, and so also in Madras and Bombay, in the year 1726 when the Royal Charter created a Mayor's Court in each of the

presidencies. In this way the English Law existing in England in the year 1726, so far as it was suitable to the Indian conditions, was made applicable to the presidency towns. Now what was left undecided was whether the subsequent Charters (i.e. 1753, 1774) could be regarded as substantive re-introductions of the English Law upto their dates? The Regulating Act and the Charter had left the point untouched.

The Supreme Court was to have jurisdiction to decide the cases arising among the native inhabitants of Calcutta. Then again, the servants of the Company were also placed under the Court's jurisdiction. Many of them were Indians. So, were the natives to be subject to the English Law or to the respective personal law? Thus, the question of the law applicable to them was also left unsettled.

The Supreme Court also administered English Criminal Law, which at the time, to say the 'hanging law'. A large number of offences under it was punishable with death. The Indians did not know anything about this law. So they did not like it as it was completely foreign to their conceptions, traditions and manners.

The provisions of the Regulating Act regarding the relation between the Supreme Court and the Governor-General and Council were obscure. Could the Supreme Court take cognisance of the acts done by them in execution of their orders? The Supreme Court was barred from trying any criminal case against the Governor-General and any members of the Council, except in case of treason or felony. Did this mean that they could be tried for treason or felony? Further, the Governor-General and Council was exempted from arrest in any suit, action or proceeding by the Supreme Court. Did

this exemption of arrest extend to civil proceeding only or extend to criminal proceedings as well?

The disaffection arose between the Government and the Court mainly under three heads : firstly, the Court's exercise of jurisdiction over the revenue officers so as to punish them for corrupt or oppressive acts done in official capacity in the collection of revenue and issuing of 'habeas corpus' to liberate those who had been confined for non payment of revenue ; secondly, the claim of the Supreme Court to try illegal acts of the judicial officers of the Company done in their official capacity; thirdly, issue of writ of 'capias' against native defendants residing in Bengal, Bihar and Orissa to make them appear before the Court to plead to its jurisdiction. The Supreme Court to this extent think that all natives come under its jurisdiction i.e. to plead jurisdiction at least.

E. The Trial of Raja Nand Kumar

1. Reveals : (i) Conflict between Warrant Hastings and the majority of the Council; (ii) Conflict between the Supreme Court and the majority of the Council ; (iii) Anomalous character of the English Law on the Indians.

The Supreme Court was to act as the saviour of the Indians. A large number of natives, as resident of Calcutta and also as servants of the Company, had been subjected to the Court's jurisdiction, which was very hard for them. The law applied by it was unknown to them and was completely out of harmony with their culture and traditions. Its proceedings were very costly.

2. Facts : Raja Nand Kumar brought certain charges of corruption and bribery against Warren Hastings before the Supreme Council. Just after a few days Raj Nand Kumar was tried by the Supreme Court, on a charge of forgery brought

against him by an Indian, Mohun Pershad. The Court found him guilty of the offence of forgery and sentenced him to death under the Act of the British Parliament enacted in the 1728. The sentence of death was duly executed. The forgery alleged to have been committed in 1770.

Since the day of his trial, doubts have often been expressed that Nand Kumar was the victim of Warren Hasting's rage, that he was tried ostensibly i.e. indirectly for forgery but in reality for his courage to bring charges against Hastings. Macaulay, Mill and a host of other historians have, in no uncertain terms, accused Impey of having conspired with Hastings to put Nand Kumar out of Hasting's way. Impey, the Chief Justice of the Supreme Court, was a very good friend of Hastings.

The charge of conspiracy against Impey is based only on the sequence of events and not on any direct evidence.

3. Views which Favour The Supreme Court : There is some difficulty in accepting the proposition that there was any conspiracy between Impey and Hastings against Nand Kumar on the following reasons : (1) He was tried not only by Impey, but by the Whole Court consisting of four judges. (2) There was a jury of twelve Englishmen. He was unanimously held guilty by all the Judges and also by the jury. (3) The Act of 1728 for forgery had been applied earlier in Radhacharan case.

But apart from this, there were certain incidents in the case which raised strong doubts in the minds of the people about the bonafides of the Court.

4. Views Which Disfavour The Supreme Court: Macauley, Mill and a host of other historians have accused Chief Justice Impey of committing 'judicial murder' being Impey a good

friend of Warren Hatings. Following points prove the decision as unfair:

(1) Every Judge of the Court cross-examined the defence witnesses and under this methodology and severe cross-examination, the whole of the defence collapsed.

(2) After the conviction of Nand Kumar an application for granting leave to appeal to the King in Council was moved in the Supreme Court, but it was rejected.

(3) The Charter of 1774 had vested in the court an authority to reprieve and suspend the execution of a capital sentence and recommend the case for reference to His Majesty. The court did not exercise this power even in this fit case.

(4) The offence for which Nand Kumar was convicted, had been allegedly committed by him five years back, much before the establishment of the Supreme Court itself i.e. (During the period of Mayor's Court).

(5) The Statute under which Nand Kumar was sentenced to death for forgery was passed in England in 1728 and it had a special reference to the peculiar circumstances prevailing there. The provisions of the law on the point had never been made known in Calcutta as the Act of 1728 had never been promulgated there in Calcutta. Neither by the Hindu Law nor by the Muslim Law had forgery been ever regarded as a capital crime. To sentence an Indian to death under these circumstances, by applying literally a rule of English Law, was unjust in the extreme.

(6) As reference was given by Supreme Court about the application of Act of 1728 in *Radhacharan case*; in this case the sentence of death was remitted in this case same

offence of forgery had been alleged to have been committed.

Lord Macauley has said that Impey "acted unjustly in refusing to respite Nand Kumar..... Hastings thrice or four years later, described Impey as the man to whose support he was at one time indebted for the safety of his fortunes, honour and reputation."

These strong words can refer only to the case of Nand Kumar; and they must mean that Impey hanged Nand Kumar in order to support Hastings due to conspiracy might have existed between the two.

Thompson and Ganet opined – "No writer cites any second instance of forgery being punished with death. In Calcutta in 1802, the Chief Justice expressly lamented that the crime was not yet capital."

Keith is of the opinion that the Supreme Court committed an "Odious Crime" in convicting Nand Kumar.

Learned Beveridge established that the trial was not fair.

The trial and execution of Nand Kumar shocked the Indians rudely. They were apprehensive of the Court as they did not know as to when, under the mysterious provisions of the English Law they might become liable to be punished.

5. Applicability of the Act of 1728 : The trial of Nand Kumar throws interesting light on the early notions entertained by the Supreme Court on the important point regarding the application of the English Law to Calcutta In the view of the court the statute of 1728 was applicable to Calcutta. Now the applicability of a particular English Statute to the Presidency town depended on two factors. Firstly, whether or not it was suitable to the circumstances and conditions of persons and place? On this point the Supreme Court held that the Statute,

was suitable to the conditions of Calcutta because the town of Calcutta enjoyed a great commercial importance and that the same conditions which existed in England exist here.

Secondly, the application of the Statute of 1728 depended on the question of the date on which the English Law might be regarded as having been introduced into Calcutta. The Mayor's court was a court of English Law and so it was the fact in 1726 that the Common Law of England, both civil and criminal, alongwith the statutory law of England became applicable to Calcutta. Subsequently, two other Charters, in 1753 and 1774, were issued by the Crown. Did these Charters also introduce English Law in Calcutta? The defence in that case did not raise this point and perhaps, it was regarded as common ground that the subsequent Charters also had introduced English Law in Calcutta. The Supreme Court acted on that supposition and thinking that Statute to be applicable being assuming that the Letters Patent of 1774 had re-introduced English Law in Calcutta and that the Statute of 1728 was applicable there. Later, however, the judicial view, underwent a change and it came to be held that subsequent Charters viz., 1753 1774 could not be regarded as substantive re-introductions of English Law upto their date. It is difficult to say as to when this rule became fixed. On this view, the Act of 1728 was not applicable in Calcutta in the present case.

F. Case of Kamal-ud-din

1. Reveals : The Supreme Court was clearly acting in accordance with the policy of the Act which was to protect the Indians from oppression in the collection of revenue. The first case in this regard is – Case of Kamal-ud-din.

2. Facts : Kamal-ud-din having been committed to prison in execution by the Calcutta Revenue Council due to arrears of

revenue existing against him as farmer of the revenue. He obtained habeas-corpus from the Supreme Court at Calcutta. The Court directed the Chief of the Council to accept bail for Kamaludin. The Council or Government regarded the said order as an encroachment on the Diwani Rights of the Company. It contended that there was no specific provision in the Regulating Act to empower the Court to do so and that the proceedings in releasing Kamaludin is excess of the jurisdiction of Supreme Court. The Supreme Council (i.e. Calcutta Revenue Council) maintained the position that any act done by it in connection with the Collection of Revenue, its officers were exempt from the Court's jurisdiction. But the Supreme Court took the position that it was competent to entertain such actions.

Chief Justice Impey maintained that the Court had intervened to prevent the Company's officers "under colour of legal proceedings being guilty of the most aggravated injustice."

Ferminger says that the Court did not desire to interfere with the "ordering and management of revenue but collection of revenue was a different matter."

Impey further asserted that the court would be guilty of a breach of trust, if it refused to take cognisance of violence and oppression made use of in collection of revenue.

It appears from study that sometimes later – Kamaludin was arrested again and he again obtained writ of habeas corpus from the Court and he was finally discharged by the Supreme Court.

G. The Patna Case (1777 -79)

1. Reveals : (i) Supreme Court's jurisdiction against illegal acts committed by the judges of the Provincial courts in their official capacity.

(ii) The weaknesses of the Provincial courts.

2. Facts : Shabaz Beg Khan, a native of Kabul, came to India, became a soldier in the Company's army and gathered a considerable fortune. His wife was Nadirah Begum. They had no issue. Consequently, Shahbaz called his nephew, Bahadur Beg, from Kabul to live with him. He expressed a desire to adopt Bahadur Beg, to hand over property to him and retire from the world. But before this project could be fulfilled, Shahbaz died in 1776.

Thereafter, a struggle for property ensued between Bahadur Beg, on the one hand and Nadirah Begum, on the other. Each of them claimed the whole of the estate of the deceased. The Begam claimed the property on the ground that her deceased husband had made a gift of the whole property to her, and she produced relevant documents to substantiate her claims. Bahadur Beg on the other hand, claimed the property as the adopted son of the deceased. As the matter could not be settled amicably between them, Bahadur Beg filed a suit against the Begum in the Company's Provincial Council at Patna (i.e. being Provincial Council Area). It may be noted that the judicial plan of 1774 was in operation at the time. Under this system, civil justice at Patna was administered by the Provincial Council composed of the English servants of the Company. The Provincial Council did not use to act merely as the Civil Court for Patna, but also acted as the agency to supervise the collection of revenue in the Division. In the discharge of their judicial functions, the English servants in the

Provincial Council were assisted by the native law officers, Kazis or Pandits who would expound the respective law.

According to the regulations promulgated in 1774, the function of the native law officer was merely to expound the law after all the relevant facts had been decided by the Court on the basis of the evidence produced before it by the parties to the dispute. The function of the native law officers was not to decide the question of fact; they had no more functions but to advise the judge in the Diwani Adalat as to the law applicable to the facts decided by the Court. But the usual practice prevalent in the Adalats was very much different. The English Judges, being ignorant of the Indian laws and customs, found it onerous to dispense justice in person. Moreover, they were very busy in the more interesting work of collection of revenue and had very little inclination or leisure to discharge judicial functions. They, therefore, used to remit the whole case to the native law officers for investigation. The case was considered by them, evidence taken and facts decided, and after all that, they used to make their report to the Court, which it confirmed as a matter of course. In this way, the whole business of administration of justice had been left by English Judges in the hands of native law officers, (Pandits or Kazis) according to the nature of the particular case.

3. Issues to Report : In pursuance of this practice, the Patna Council remitted the case of Bahadur Beg to the Kazis. They were required to report these questions of facts :

1) To make an inventory of the property of the deceased;
2) To collect the property and seal it;
3) To report to the Council about the rights of the parties; 'that according to ascertained facts and legal justice'

they were to transmit to the Council a written report specifying the shares of the parties.

Thus the task of making inventory and collecting property and determination of the rights of the Parties were not within their power. In other words they (Kazi) had power to tell the law on the question asked for. Hence they had no right to decide the question of facts.

While collecting property at the house of the deceased, they treated the Begum with disrespect and violence. Thereupon, the Begum left the house and went to live in a Dargah.

The officers took evidence to ascertain facts. The process adopted by them for this purpose was extremely irregular and informal viz., (1) No oath was administered to any witness. (2) Many witnesses did not appear before the officers in person. Chits having questions were sent to them through messengers who brought back the answers on the same chits.

On the basis of evidence recorded in this way, the Kazi and the Muftis came to the conclusion that the deeds produced by the Begum in support of her plea that the property had been gifted to her by her husband, were all forged and so invalid. The property was distributed according to the Mohammaden Law. One fourth of the property was allotted to the Begum; three fourth to Shahbaz's brother (Bahadur Beg's father), who was the other heir of the deceased.

This decision shows that the Kazi and Muftis had an adequate knowledge of the Mohammedan Law. Bahadur Beg was not an heir, being the Mohammaden Law (Hanif School) did not recognise anything like 'Adoption'. His father and the widow of deceased, were the true heirs. As Bahadur's father

was away and he could not look after his property, the officers entrusted that part of the property to Bahadur Beg, as his son and representative in India.

As usual practice the Provincial Council accepted the report of the Kazi and Muftis and ordered that division of the property to be made accordingly.

4. Appeal in S.D.A. Calcutta

The Begum being dissatisfied with this verdict, refused to accept the fourth share. She filed an appeal against the decision, in the Sadar Diwani Adalat at Calcutta. This Court was composed of Governor General and Council. The Judge's sittings were very irregular. The Begum waited for some time but the Sadar Adalat did not take any action in the matter.

5. Action in Supreme Court

Ultimately, she brought an action before the Supreme Court of judicature against Bahadur Beg, the Kazi and Muftis. Her grounds of complaint were the various personal indignities shown to her by these persons. Her action was for assault, battery, false imprisonment, breaking and entering her house and carrying away her property etc. She claimed damages amounting to six lacs of rupees.

(i) Writ of Capias : According to its usual procedure the Supreme Court issued a 'Writ of Capias' on the defendants, which meant a warrant of their arrest, liable to be released on bail. All the defendants, Bahadur Beg, the Kazi and the Muftis were arrested and brought to Calcutta from Patna. As they were unable to furnish the necessary bail, they were lodged in the jail pending the trial till the final decision of the action brought against them.

(ii) Jurisdiction : There was no difficulty about the Court's jurisdiction over the Kazi and Muftis. They being the servants

of the Company undoubtedly fell under it. In what sense was Bahadur Beg subject to the jurisdiction of the Supreme Court? This was a question of real importance. It was proved that Bahadur Beg was a farmer of land revenue of certain villages in Bihar, and the court, therefore, determined that he was 'a subject of the jurisdiction of this Court, as being directly or indirectly in the service of the East India Company.'

(iii) Question of Fact and Law : The Kazi and the Muftis pleaded that it was the established custom of the Provincial Council to refer cases in which Mohammadens were parties; and in which the Mohammaden Law would apply, to the Kazi and Muftis, who would hear evidence on both sides and make a report to the Council.

The Supreme Court cast off this plea. The court unanimously held that the proceedings of the law officers were illegal and unwarrantable. The grounds for this decision were :

(1) The power to administer justice was vested in the Council at Patna.

(2) This Court had not performed any judicial act itself, but had left the determination of the whole cause to the Kazi and Muftis including the questions of facts and law.

Thereafter, the Supreme Court went into the actual merits of the case. It came to the conclusion that the Begum had been treated harshly by the law officers, that they had treated her as an object of 'rapine and plunder', and that the claim of the Begum to the whole of the property of her deceased husband was well founded on the documents on which she relied, and which had been declared to be forgeries by the law officers, were in reality valid and genuine documents. 'The Damage altogether, for taking away the

property, and for the personal injuries, was estimated at three lacs of rupees, therefore, judgement was pronounced in favour of plaintiff, with damages to that amount with costs'.

The defendants Bahadur Beg, the Kazi and the Muftis-being unable to pay such huge damages, were remained in the jail.

The Supreme Court has often been criticized for its role in the Patna Cause on the ground that it took cognisance of acts done by the judicial officers of the Company in the discharge of their public functions. The proceedings of the Kazi and Muftis were irregular and unwarranted by the regulations. The Patna Cause betrayed in the most telling manner the essential weaknesses of the judicial machinery of the Company as it worked irregularly.

Thus the Supreme Court had done something which was extraneous to their office. The Provincial Council had practically reduced itself to a mere nominal body and that it had entrusted the entire judicial work to the native law officers. This practice was inconsistent with the Regulations. This cause also revealed that the working of the Sadar Diwani Adalat was very irregular.

No doubt, all that happened was very obnoxious to the Company and its representatives at Calcutta.

H. The Cossijurah Case (1779)

(1) Reveals: Effect of writ of capias on native defendants.

(2) Facts: Cossinaut Baboo advanced on loan a large sum of money to the Zemindar of Cossijurah. The money remained unpaid for long period. Cossinaut, therefore, brought a suit in the Supreme Court against the said Zemindar on August 13th, 1779. He stated that the Zemindar was employed in the collection of the revenue.

(3) Issue of Writ of Capias : As usual, the Supreme Court started with issuing a writ of capias warranting the arrest of the Zemindar, from which he could save himself only by offering a bail of three lacs of rupees. The Zemindar, on the other hand, concealed himself in order to avoid service of the writ, and thus saved himself from arrest. The Writ of Capias returned to the Court unexecuted.

(4) Notification : In the meantime, the Collector of Midnapur, within whose jurisdiction, the Zemindary of Cossijurah lay, informed the Governor General about this development and stated that the Zemindar was concealing himself, to the detriment of the revenue which, otherwise, he ought to have been collecting. The Governor General referred the matter to the Advocate General for his opinion.

The Advocate General in his report stated that the Regulating Act did not seek to extend the jurisdiction of the Supreme Court to the Zemindars of the Bengal, Bihar and Orissa. He therefore, advised the Governor General that the Zemindar of Cossijurah be given a notice that, not being subject to the jurisdiction of the Supreme Court, he should not appear, plead or do or suffer any act which might amount on his part to a recognition of the authority of the judicature as extending to him. The Governor General and Council informed the Zemindar of Cossijurah that he should not do anything which might give countenance to the Court's authority extending to him. They also published a general notification to the landholders informing them that they were subject to the jurisdiction of the Supreme Court only if they were servants of the Company or had subjected themselves to it by their own consent.

(5) Writ of Sequestration : 'Writ of Capias' having returned unexecuted, the Supreme Court in order to compel the personal appearance of the said Zemindar, issued another writ to sequester his property. To execute this 'writ of sequestration', the Sheriff of the Court collected a small force and despatched to Cossijurah.

(6) Arrest of Small Force : Governor General and Council on being informed of these developments, also despatched a small force to Cossijurah. The Governor General and Council's party apprehended the Court's party and brought it to Calcutta.

In this way, the case of Cossijurah led to an exhibition of force and violence on the part of the Government against the Supreme Court.

(7) Next Action of Trespass : The next step was taken by Cossinaut Baboo; he brought an action before the Supreme Court for trespass against the Governor-General and members of the Council individually. At first the Governor-General and his colleagues entered their appearance. But when they found that they were being sued for acts done by them in their public capacity, they all instructed their counsel to make a declaration in the Court that they withdrew their appearances and that they would not submit to any process which the Court might issue against them. Lastly the Court did not proceed further against these people. But the Court punished North Naylor, the Advocate General of the Company on the ground that he gave advice to the Government to defy the Court processes. Naylor was imprisoned and he later died in jail. Naylor thus fell a victim of the wrath of judges of Supreme Court.

On the basis of this case, it has often been suggested that the Council interfered with the Court because as already explained, when a person filed a suit in the Supreme Court and

presented an Affidavit to show that the person complained of was subject to its jurisdiction, the Supreme Court used to issue a 'writ of capias' to force his appearance. On appearance before the Court, he could plead that he is not under its jurisdiction. No further action was taken if the court accepted this plea. In pursuance of this practice, the Raja of Cossijurah (Zemindar) ought to have appeared before the Court in response to the capias and then he could have pleaded non-applicability of its jurisdiction. The method no doubt, was inconvenient for the Indians. But that was the practice, and there was no justification for the Government to resort to violence on this point. What the Governor General and Council ought to do was not to interfere, instead it screened the Zemindar.

(8) Comments : In the contest leading to the Cossijurah case there was no question of exceeding of jurisdiction and such an allegation against the court is unfounded. Sir James Stephen had given the crux of the Cossijurah case thus : "The court held, as they could not but hold, that everyone in Bengal, Bihar and Orissa was subject to its jurisdiction, to this extent that he was bound, if sued in the Supreme Court to appear to plead to the jurisdiction." But the Governor General and Council did opposite to its duty. In other words, it advocated that every defendant was to be judge in his own cause, whether he was subject to the jurisdiction of the Supreme Court or not.

The conduct of the Government in the Cossijurah Case was reprehensible. If they had thought that the court went beyond its legitimate powers, they ought to have taken a direct decision from the court upon the questions in which they were directly interested, and testing its correctness by an appeal to the King in Council.

Arrest on mesne process was criticised by Stephen as "Arrest on mesne process was beyond all questions one of the worst and most apprehensive points of the law of England and its introduction to India was indefensible."

I. The Act of Settlement, 1781

Owing to the conflicts between the Supreme Court and the Supreme Council (i.e. Governor General and Council), the condition of civil and judicial administration in the country became intolerable. The policy of the Regulating Act had completely broken-down. The Government hated the Supreme Court because it interfered with their administrative methods and sought to control their governmental actions. Its interference in the sphere of revenue collection was obnoxious to the council. The Supreme Court was disliked by the European community because it sought to stand in the way of their 'violent, illegal, vaxatious, dishonest and oppressive practices.' The court was disliked by the natives also. The procedure, language, law and everything connected with the Court were a mystery to them.

No longer could things be allowed to drift. To set things right, Parliament had to intervene. In 1781, it passed an Act, known as the 'Act of Settlement'. The Act was passed after a thorough inquiry by the Select Committee of the House of Commons in the administration of justice in Bengal, Bihar and Orissa.

The Preamble of the Act of 1781 showed that the contest between the Court and the Council had been won by the later.

The Act laid down that the Governor General and Council of Bengal, shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in

Bengal for any act done by them in their public capacity only and 'acting as Governor General and Council'. In this way, the Government was rendered immune from the jurisdiction of the Supreme Court. This provision, no doubt, was suggested by the Cossijurah case where contempt proceedings were sought to be taken against the Governor General and Council.

The Act in its second section declared that no person would be held responsible by the Court, either civilly or criminally, for acts done by him in pursuance of an order of the Governor General and Council in writing. This immunity was not however, extended to an order of the Council which applied to a British subject; in such a case the Supreme Court was to maintain full and complete jurisdiction as it hitherto had. However, the Governor General and Council, jointly or severally, or any other person acting under their orders were not to be immune from any complaint, suit or process before any Competent Court in England (section 4).

Section 8 restricted the jurisdiction of the Court in a very vital respect. It was laid down that the Supreme Court 'shall not have or exercise any jurisdiction in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the regulation of the Governor General and Council. The sphere of the collection of revenue was thus exempted from the Court's purview. (This section is outcome of Kamaludin Case)

Section 9 declared that no person was to be subject to the jurisdiction of the Supreme Court on account of his being a landowner, landholder, farmer of land etc. This section was the result of the decision of the Supreme Court in the [Patna Case] in so far as it was held in the case there that a farmer of

land revenue, being in the indirect service of the Company, was subject to the Court's jurisdiction. Thus Zemindars, landholders, land owners, farmers were specifically excluded from the jurisdiction.

Section 10 laid down that no native person employed by the Company, or the Governor General and Council or by any British subject, was to be subject to the jurisdiction of the Supreme Court in matters of inheritance succession or contract, except in actions for crime and tort and in civil actions. The effect of this section was to exempt these persons from the Supreme Court's jurisdiction in civil matters, in which cases, thereafter, they were subjected to the Company's Courts in the Mofussil. They however, continued to be under the Supreme Court's jurisdiction in the matters of crimes and torts.

Section 17 declared in specific terms that the Supreme Court of Judicature 'shall have full power and authority to hear and determine, 'all and all manner of actions and suits' against the inhabitants of Calcutta. It was further provided that all matters arising out of inheritance and succession to land and goods, and all matters of 'contract and dealing between party and party, shall be determined, in the case of Mohammadens, by the laws and usages of Mohammedans and in the case of Gentoos, by the laws and usages of Gentoos'. It was further provided that where only one of the Parties shall be a Mohammedan or Gentoo, the Supreme Court would apply to 'laws and usages of the defendant'. Thus Supreme Court was to apply three systems of law viz., English Law, Hindu Law and Muslim Law.

Section 19 provided that it shall and may be lawful for the Supreme Court to frame process and make rules and orders for suits civil or criminals, against the natives, so as to

accomodate their religion and manners, so far as it was possible, consistent with the due execution of the laws and attainment of justice.

Section 21 was very important in so far as the Sadar Diwani Adalat now accorded recognition as a court to hear and determine appeals and references from the country courts in civil cases. It was to be a court of record and its judgements were to be final and conclusive except upon appeal to His Majesty, in civil suits only where the value was to be five thousand pounds and more. The Status of the Sadar Diwani Adalat became co-equal with that of the Supreme Court as both were backed by parliamentary legislation and from both appeals went to the Privy Council.

Section 22 authorised the Sadar Diwani Adalat to hear and determine all offences, abuses and extortions committed in the collection of revenue, or of severities used beyond what appeared to the Court customary or necessary to the case. The punishment to be awarded by the Court in such cases was not to extend death, maiming or perpetual imprisonment. Thus the area of collection of revenue having been taken out of the purview of the Supreme Court, it was now subjected to the discipline of the Sadar Diwani Adalat.

Section 24 was suggested directly by the Patna Cause with a view to make the judges and the law officers of the Company's courts safe in the discharge of their office, it was now laid down that no action for wrong or injury was to lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country courts for any judgement, decree or order of the court, nor against any person for any act done by, or in virtue of the order of the court. Section 25 prescribed the process according to which an action could be brought in

the Supreme Court against a judicial officer or the Magistrate of the Company, for any corrupt act. Before such an action could be brought, it was necessary to give a notice in writing to the person concerned, the duration of the notice varying from one month to three months. The notice was to contain fully the cause of complaint. The service of notice was mandatory. Section 26 declared that no magistrate was to be arrested or obliged to put on bail in any such case, 'until he shall have declined to appear to answer, after notice given' as said above.

Section 27 was also suggested by the Patna Cause. All those persons who were committed to the prison by the Supreme Court in the Patna Cause were to be released, damages awarded against them were to be paid by the Company.

The Act of 1781 did not stop here. As we know under the Regulating Act 1773, the Governor General and Council was to have legislative powers for the town of Calcutta, subject to the control of the Supreme Court. The laws passed by the Governor General and Council under this provision had to be reasonable and consistent with the laws of England and had to be registered with the Supreme Court. Still since 1772 onwards, the Company's Government at Calcutta had enacted a number of Regulations applicable to Bengal, Bihar and Orissa. This had been done under the powers available to the Company as Diwan. There was no parliamentary sanction or recognition for the exercise of such power of legislation. By Section 23, however, conferred for the first time legislative power on the Governor General and Council for the purpose of making laws for Bengal, Bihar and Orissa. The section laid down that within six months of the Regulations having been passed, their copies were to be transmitted to the Court of Directors and to

one of His Majesty's secretaries of state. His Majesty in Council might disallow or amend the Regulations so passed within a period of two years. The Governor and General thus came to have two different legislative powers. One under the Regulating Act 1773 available for Calcutta. The second power was derived from the Act of Settlement, 1781 and was available for the provinces of Bengal, Bihar and Orissa. According to Cowell – "The Supreme Court had no controlling power in regard to these regulations, but it was not bound by them."

J. Evaluation

The Act of settlement, 1781 was substantially in favour of Governor-General in Council and against the Supreme Court on all counts.

The Parliamentary recognition of the Company's Courts; the declaration of the rights of Hindus or Mohammadens and so on brought a complete settlement, to form the Foundation of Indian Polity for coming generations. Notable feature of the Act of 1781 was the recognition accorded by the Parliament to the Company's judicial system in the Mofussil, existing independently of the Supreme Court, with the Sadar Diwani Adalt as the Chief Appellate Court of the country.

The controversy that arose on account of a careless omission by the authors of Regulating Act to define the limits of two independent powers established by them was set at rest in 1781.

In 1781, the legislative powers were exclusively granted to the Governor-General in Council for Mofussil Area.

Cowell opined – "The Council regardless of the limited extent of its legislative authority, had passed numerous

Regulations and in 1793 collected and passed them in the shape of revised code (Cornwalli's Code, 1793)".

K. Contribution

Cowell points out the respect of the institution by Indians and Europeans – "It was hailed as a great institution by Europeans and Indians. The English lawyers laid the foundation of a complete system of Anglo Indian jurisprudence."

Criticism : Ilbert points out (i) In the Act of Settlement like Regulating Act there was no clear provision as to the relation in which Indian territories stood to English Crown; (ii) nor as to the question whether natives of India were to be comprehended under the term 'subjects'; (iii) nor as to the question whether provincial courts were to exercise a concurrent jurisdiction with the Supreme Court or an exclusive one.

L. History After 1781

(i) Due to success of the Supreme Court at Calcutta in course of time similar judicial system was created in the Presidency towns of Bombay and Madras. The Supreme Courts were established there. (ii) The Presidency towns system and the Mofussil or Provincial System continued to exist.

The limits of the territorial jurisdiction of the Supreme Court came to be extended in 1800. The Company acquired Benaras and other territories from the Nawab Vizier of Oudh. The jurisdiction of the Supreme Court was extended to the Benaras and to all factories, districts and places subject to the Presidency of Fort William in Bengal.

It was in 1861 that a High Court was established at Calcutta in which the Supreme Court of Judicature and the Sadar Diwani Adalat of the Company were merged together for removing the exclusiveness of both judicial systems.

CHAPTER – VIII

SUPREME COURTS AT BOMBAY AND MADRAS

Introduction

A. Mayor's Court

In the Presidency towns of Bombay and Madras, the judicial system, inaugurated by the Charter of George III in 1753, continued in operation for a longer period than it did at Calcutta.

Civil justice was administered by the Mayor's Court and Governor General in Council. Criminal justice was administered by "Criminal Court of Oyer and Terminer and Gaol Delivery" comprised of Governor General in Council. The judges of civil and criminal courts were lay persons i.e. non lawyers. It was but absolutely necessary to have professional lawyers as judges.

B. Establishment of the Recorder's Court

In 1797, the British Parliament, passed an Act authorising the Crown to supersede the judicial arrangements of 1753 and establish the Recorder's Courts instead. On February 1, 1798, King George III issued Charter for the purpose of creating these courts. These courts started to function in Bombay and Madras in the end of the same year.

1. Constitution : Each of the Recorder Courts consisted of the Mayor, three Aldermen of the Corporation and a Recorder. The Recorder was to be appointed by His Majesty.

The Recorder was to be a lawyer of not less than five year's standing. He was to be the President of the Court.

2. Court of Record : The Recorder's Court was to be a Court of Record.

3. Jurisdiction : The Court had all Civil, Criminal, Ecclesiastical and Admiralty jurisdiction. The jurisdiction, powers and authority to be conferred on the Recorder's Court by the Royal Charter were to be on lines similar to those of the Supreme Court of Judicature at Calcutta. Like the Supreme Court at Calcutta, the Recorder" Court was to be a Court of Oyer and Terminer and Gaol Delivery for the respective settlement. Decision in civil cases involving 1000 pagodas was final hence no appeal lie against it.

4. Few Categories : The jurisdiction of the Recorder's Court was to extend over the British subjects, residents within the territories of the respective settlement as well as those residing in the territory of native Princes in alliance with the Government. The Recorder's Court was to exercise jurisdiction on any person, who was employed by, or was directly or indirectly in the service of the Company or any of his Majesty's subjects.

5. Restrictions : All the restrictions imposed on the Supreme Court of Judicature at Fort William by means of the Act of Settlement of 1781, were also extended to the Recorder's Court. Accordingly, the Recorder's Court was not to have any jurisdiction or authority in the matter concerning revenue. No person was subject to its jurisdiction by reason of his being a landowner, landholder, or farmer of land revenue. The Governor and Council of the Settlement were to be immune from arrest. No action against them, either individually or collectively, could be entertained by the Recorder's Court for anything done by them in their public capacity.

6. Law : Each of the Recorder's Court was to have full power and authority to hear and determine all suits or actions that might be brought against the inhabitants of each of the

respective presidency towns of Bombay and Madras. In matters of succession, and inheritance and matters of contract between Party and Party, the Recorder's Court, like the Supreme Court at Calcutta, was to administer Hindu Law to the Hindus, Mohammedan Law to the Muslims, and the Law of the Defendant if parties belonged to different religious persuasions. English Law for the residents of settlement.

No action for wrong or injury was to be entertained against a person exercising a judicial functions in the country. The jurisdiction of the Recorder's Court in this respect was to be the same as that of the Supreme Court at Calcutta.

7. Appeals : Appeals from the decisions of the Recorder's Court were to lie to the King in Council, practically on the same basis as the appeals from the Supreme Court at Calcutta were lie.

C. Court of Requests

The Act of 1797 made an important change in the jurisdiction of the Courts of Requests existing in the three presidency towns of Calcutta, Madras and Bombay under the Charter of 1753. The Charter of 1753 had fixed the jurisdiction of these Courts at five pagodas. The Act of 1797 extended their jurisdiction to eighty rupees. These courts were convenient and beneficial in civil suits.

D. Recorder's Court *v.* Mayor's Court [1726]

1. As regards the composition, the Recorder's Court was the Old Mayor's Court with the addition of lawyer as a Recorder.
2. The Mayor's Court had lacked legal element. The Recorder's Court, because of the presence of the Recorder, a professional lawyer, was better suited to administer justice than its predecessor.

3. As regards the jurisdiction, the Recorder's Court differed from the Mayor's Court; while the Recorder's Court was both a Court of Civil and Criminal jurisdiction, the Mayor's Court was a court of civil jurisdiction only.
4. Indians were exempted from the compulsory jurisdiction of the Mayor's Court, there was no such restriction on the Recorder's Court. On the other hand, inhabitants of the Presidency Town were specifically declared to be under the jurisdiction of the Recorder's Court.
5. Mayor's Court was a court of English Law. But Recorder's Court was not purely a court of English Law; it applied Hindu Law and Mohammedan Law also to Hindus and Mohammedans respectively.
6. Appeals of all decisions from the Mayor's Court lay first to the Governor and Council and then in matters involving more than 1000 pagodas to the King in Council. From the Recorder's Court, appeals in all cases over 1000 pagodas lay straight to the King in Council. The Governor and Council were not to have any appellate jurisdiction over the Recorder's Court.
7. Recorder's Court enjoyed admiralty jurisdiction which Mayor's Court did not enjoy.

E. The Supreme Court at Madras

Just after two years, in 1800, the British Parliament passed an Act authorising the Crown to abolish the Recorder's Court and establish Supreme Court of Judicature at Madras by a Royal Charter. King George III issued the Charter on 26th December, 1800 and the Supreme Court came into function on 4th Sept. 1801. The powers of Recorder's Court were

transferred to the Supreme Court, which was to exercise the same jurisdiction and powers subject to same restrictions as the Supreme Court of Judicature at Fort William in Bengal was exercising.

F. The Supreme Court at Bombay

The Recorder's Court at Bombay (now called Mumbai) functioned for a longer period than its counterpart at Madras. Ultimately an Act was passed in 1823, during the reign of George IV, authorising the English Crown to abolish the Recorder's Court at Bombay and establish a Supreme Court of Judicature in its place. The Supreme Court of Judicature at Bombay was established by a Charter issued by the King on 8th December, 1823 which came into function on 8th May, 1824 consisted of the same number of judges as the Supreme Court of Fort William in Bengal. It was to be invested with the same powers and authorities as the Supreme Court of Judicature at Fort William subject to same restrictions e.g. it could not deal with matters relating to the Governor and Council in their official capacity, the matters relating to Hindus and Mohammedans were to be decided by their own law etc. Appeals against the decision of Supreme Court could lie to King in Council in matters involving 3000 Bombay Rupees or amount exceeding to it.

A Charter of Justice establishing Supreme Court at Bombay was issued by the Crown on 8th December, 1823. The Court was formally inaugurated at Bombay on 8th May, 1824.

By the first quarter of the 19th century, therefore, there were established three Supreme Courts of Judicature in the three Presidency towns of Calcutta, Bombay and Madras, more or less on a uniform basis.

G. Conflict in Bombay

Within a very short time of its creation, the Supreme Court of Bombay came into conflict with the Government. The conflict in Bombay was the result of issuance of certain writs of Habeas Corpus' to certain persons beyond the Bombay Town.

The first case was that of Moro-Raghonath, a boy who was detained for over a year under circumstances of great hardship and cruelty, by his grand-father, Pandurang Ramchander, residing at Poona. A relative of the boy moved the Supreme Court for the issue of the writ of Habeas Corpus on 25th August 1828. The motion was opposed by the Advocate General on the ground that Ramchander and Raghunath were natives residing at Poona and so were not amenable to the jurisdiction of the Supreme Court. The Court overruled the objection and ordered the issue of the writ. But Government forbade a return being made to the writ.

The other was the case of Bappoo Gunness, who was detained in custody by virtue of an order of the Adalat 'Court of Concan', having been found guilty of embezzlement. He had been sentenced to two year's imprisonment and a fine of Rs. 350. The Supreme Court issued the writ of Habeas Corpus. The Governor and Council opposed this and forbade a return being made to the writ.

The Judges of the Supreme Court made a petition to His Majesty against this intruison of the Government and prayed His Majesty for the protection of dignity and lawful authority of the Supreme Court. Regarding this petition, the report of the Privy Council was different, which was affirmed by His Majesty. The report was that the writs of Habeas Corpus were improperly issued in the above two cases referred to in the said

petition. The Supreme Court has no power or authority to issue a writ of Habeas Corpus except when directed either to a person residing within those local limits wherein such court has a general jurisdiction or to a person out of such local limits, who is personally subject to the civil and criminal jurisdiction of the Supreme Court.

Evaluation

The law administered by the Supreme Courts at the three Presidencies might be classified under the following distinct heads :

1. The Common Law was applied as it prevailed in England in the year 1726 and which had not been subsequently altered by Statutes, especially extending to India, or by the Acts of the Legislative Council of India.
2. The Statute law was applied which prevailed in England in 1726 and which had not been subsequently altered by Statutes especially extending to India, or by the Acts of legislative Council of India.
3. The Statute law was applied which expressly extending to India, enacted after 1726.
4. The Civil law as it was applied in the Ecclesiastical and Admiralty courts in England.
5. Regulations made by the Governor General in Council and the Governor in Council under the powers conferred on them by the various parliamentary enactments. After 1833, the Acts of the Legislative Council of India were applied.
6. Hindu Law in actions regarding inheritance and succession and matters of Contract and dealing between

party and party in the case in which a Hindu was a defendant.

7. Mohammedan Law in actions regarding inheritance and succession and all matters of Contract dealing between party and party in which Mohammedans were parties.

Some doubts in regard to the powers and functions of these courts (i.e. Supreme Courts at Madras & Bombay) existed as they existed in Calcutta, hence some conflicts also arose with the executives of the two places i.e. Madras and Bombay. But the conflicts at Bombay and Madras were not so serious as they arose at Calcutta. The Supreme Courts functioned at Calcutta, Madras and Bombay till 1862 when the High Courts were established at all the three places.

CHAPTER – IX

JUDICIAL MEASURES OF LORD CORNWALLIS

Introduction

Warren Hastings went in 1785 after introduction of the following plans: 1772, 1774, 1780 and 1781.

Lord Cornwallis reached India in 1786 and stayed there till 1793. He was the first to put into practice the important principles of 'Rule of Law' and administration according to law.

He introduced changes in the judicial system in three installments : firstly, in 1787; then in 1790; and lastly in 1793.

A. Reasons for Issuing the System of 1787

The judicial scheme of 1780, introduced during the governor generalship of Warren Hastings, envisaged division of two functions – revenue and judicial. Many high officials of the Company thought that the amalgamation of the execution of two functions would result in efficiency, simplicity and economical at the cost of administration. The Court of Directors of the East India Company instructed Lord Cornwallis to unite the revenue and judicial organisations. The key note of this plan was economy. Sir John Shore said – "Natives had always lived under arbitrary and despotic form of government and therefore, the form of British Courts should also be despotic". Cowell opined – "The object was to accustom the natives of look at one master."

B. The Scheme of 1787

1. The number of districts was reduced from 36 to 23. In each district, an Englishman, a covenanted servant of the Company, was appointed as the Collector.

2. The Collector was to collect revenue. He was also to decide all cases arising out of revenue.
3. The Collector was to act as the Judge in the Mofussil Diwani Adalat and thus administer justice in civil cases to common man.
4. The Collector was also to act as the Magistrate in the district. In this capacity it was his duty to arrest and apprehend criminals in the district and to send them to the nearest Mofussil Nizamat Adalat for trial, if the case is not of petty nature.

In 1781, the magistrates were empowered to arrest and apprehend criminals without having any authority to try them. Lord Cornwallis in 1787 authorised the Magistrates to hear and determine all complaints for petty offences and to punish the same by corporeal punishment, not exceeding 15 strokes or imprisonment not exceeding 15 days.

All cases which merited a greater punishment were to be sent by the Magistrates as usual to the Mofussil Nizamat Adalats for trial.

5. Although the same person, the Collector, was to discharge multiple duties in several spheres, yet he was directed to keep his various functions distinct from each other as far as possible. The Regulation of 1787, therefore, laid down that the Collector should keep his revenue functions confined to the Revenue Court, to be known as the 'Mal Adalat'. The Collector was to discharge his judicial functions in civil cases in the Court of 'Mofussil Diwani Adalat'. The Collector was also to act as 'Magistrate.'

6. The 'Board of Revenue', located at Calcutta, was to hear and decide appeals from the decisions of the Collector in his Mal Adalat. A further Appeal from the Board of Revenue lay to the Governor-General in Council on the executive side.

7. Appeals from the Mofussil-Diwani Adalat, in all cases where the subject-matter involved exceeded Rs. 1000/- in value, lay to the Sadar Diwani Adalat. Decisions of the Sadar Diwani Adalat were to be final except in cases, where subject matter valuing £ 5000 or over was involved. In all such cases, further appeal lay to the King in Council, under the provisions of the Act of Settlement, 1781.

8. The Sadar Diwani Adalat was to consist of the Governor General and members of his Council. They were to be assisted by the Chief Kazi, Chief Mufti and two Moulvies and Pandits to expound the native laws i.e. Muslim and Hindu.

9. A subordinate officer, known as the Register, was appointed to provide aid and assistance to the Collector in the discharge of his judicial functions in the Mofussil Diwani Adalat. The Judge of the Diwani Adalat was empowered to authorise the Register to hear and determine causes up to Rs. 200/- The decisions of the Register, however, were not to be final until the decrees were countersigned by the Judge.

10. Uptil now, the British nationals residing in the country's interior, beyond the limits of Calcutta, were subject to the criminal jurisdiction only of the Supreme Court. To improve matters, it was now laid down in 1787 that the Magistrates would be authorised, on

information lodged on Oath, to apprehend the British subjects. After making an inquiry into the circumstances, if the magistrate was satisfied that there existed grounds for his trial, he would send the accused to the Supreme Court at Calcutta for trial. The complainants and their witnesses had also to go to Calcutta to prosecute the accused. If they were poor, their charges of journey were to be defrayed by the government.

C. Evaluation

The Collector in the district thus became a very powerful officer, he being at once the Collector, the Judge and the Magistrate. The Scheme of 1787 was a retrograde step, a swinging back of the Pendulum, as in 1781, a progressive step was taken in so far as a separation between the judicial and the executive functions.

Cornwallis said – "The system is "preposterous", under which, no improvement, in the cultivation of country, could be hoped for"

D. Reasons for Issuing the Scheme of 1790 and Judicial System Before 1790

In 1772 Warren Hastings shifted the Sadar .Nizamat Adalat from Murshidabad to Calcutta. Sadar Diwani Adalat supervised the Sadar Nizamat Adalat there.

The field of criminal law and justice had hitherto been left entirely to the Muslim law officers. The Court of Appeal known as the Sadar Nizamat Adalat, originally established at Calcutta in 1772 was shifted to Murshidabad in 1775. This Court used to revise proceedings of the Mofussil Fozdary Adalats and approve and disapprove of the sentences of death passed by them. The system of criminal judicature was under

the superintendence and control of Mohd. Reza Khan who presided over the Sadar Nizamat Adalat in the capacity of being the Deputy of the Nawab.

In 1781 Judge of Mofussil Diwani Adalat was also given power of Magistrate to arrest the accused and if satisfied about offence sent to Mofussil Nizamat Adalat.

In 1781, Warren Hastings had introduced a scheme of control over the criminal judicature by instituting, what was known as, the Remembrancer of Criminal Courts. This measure however was weak and ineffective. Bannerjee opined – "The sentences were executed without any information to the Remembrancer. And if any information was given, it was too meagre to be effective in any way."

In 1787 the magistrates authorised to try and sentence those who were guilty of petty offences. Others had to be dispatched to the nearest Mofussil Fozdari Adalat for trial.

Further, the Magistrates were, authorised to apprehend any European, British subject, who might have rendered himself liable to criminal prosecution. After having done inquiry, if the Magistrate satisfied that there existed grounds for trial, he was to send such European British subject to the Supreme Court for trial.

The system in force was notoriously defective. All district jails were overcrowded; corruption was rampant in the courts. The system was dubbed by Shore, "as a mere system of "rapine and plunder."

Many of the abuses prevailing in the system of criminal judicature arose directly as a consequence of the low and inadequate salaries paid to the officers engaged in the administration of criminal justice. Even the meagre salaries were not paid regularly. These officers could not therefore,

keep themselves above temptation and corruption. Only people of no education or character or principles who were motivated by a sense of corruption and illegal gratification rather then a sense of duty, came forward to accept these judicial offices.

Another case of malpractices prevailing in the sphere of criminal judicature was the 'insecurity of tenure of the judges'. These judges of the criminal courts started collecting money by accepting bribes, so that they might be able to live comfortably, if and when they were deprived of their positions.

Owing to the long distances, the Sadar Nizamat Adalat was not in a position to keep a close control over the working of the lower criminal courts. The decision of the Sadar Nizamat Adalat depended entirely on the report that the judge of the Mofussil Fozdari Adalat chose to submit and he could, in consideration of a sizable bribe, manipulate the evidence in such a manner that, when transmitted to the Sadar Nizamat Adalat it would appear to be sufficiently convincing as to procure the prisoner's acquittal. For all practical purposes, the power of the Mofussil Fozdari Adalat was uncontrolled and unrestrained.

Much time taken for disposal of cases by the Mofussil Courts. The Magistrate of Dacca adduced an instance of a prisoner in the Fozdari Jail at that place who had been confined for ten years under a charge of murder and upon whom no sentence had been passed. The scandal was not confined to the Mofussil Courts only, for the proceedings of the Sadar Nizamat Adalat were often dilatory.

In many cases the punishment awarded to the prisoners appeared to bear no relation at all to the nature of the offence. On the character of the judge depended to a considerable extent

the severity or lenity of punishments. A barbarous punishment awarded at times was that of mutilation of limbs.

It was the general experience of the magistrates that those who confessed their guilt were punished much more severely than those who did not.

Lord Conrwallis diagnosed that the evils in the system resulted from a twofold source : One from defects in the constitution of the criminal Courts and two : from gross defects in the Muslim law of crimes several portions of which were contrary to natural justice. In 1790 Cornwallis attempted to attack both the sources of evil.

Lord Cornwallis wanted to break completely from the past and divest the Nawab from superintendence of the criminal judicature. The most important feature of the scheme was the abolition of the last vestiges of the nominal and shadowy authority of the Nawab which had lingered on till now in the area of criminal justice. The administration of criminal justice was henceforth to be in the hands of the company's English servants and the Nawab was to do nothing with it. The system of administration of justice was completely anglicized except that the Muslim Law Officers were to be retained as advisors to the courts to expound the relevant criminal law. The criminal judicature was thus placed on the same footing as the civil judicature had already been since 1772.

E. The Scheme of 1790

(a) Reforms in Constitution of Criminal Courts : The most important step taken to infuse vitality in the criminal judicature of the country was to remove the Sadar Nizamat Adalat from Murshidabad to Calcutta. The Nawab was divested of his control over this court. Henceforth, this court also, like the

Sadar Diwani Adalat, was to consist of the Governor General and Members of the Council as Judges. In the discharge of their functions in the Sadar Nizamat Adalat, the Governor General and Council were to be assisted by the Chief Kazi of the Province and two Muftis, who were to expound the law applicable to the circumstances of the case. The decisions in the Sadar Court were to be regulated by the Anglo-Mohammadan Law i.e. Muslim Law as modified by the regulations of the Governor General in Council.

The procedure to be followed by the Sadar Nizamat Adalat was like this : All trials referred to the Adalat for its final decision by the lower courts were in the first instance reviewed by the Chief Kazi and the Muftis. The statements of the Muslim Law Officers were then placed before the Sadar Nizamat Adalat which was to pass the final sentence after consideration of all material evidence.

The Sadar Nizamat Adalat was to meet at least once in every week. A regular diary of its proceedings were to be maintained.

If the Sadar Nizamat Adalat considered a particular prisoner to be the proper object of mercy, it might recommend his case to the Governor General in Council i.e. the Govt. with the recommendation that he be pardoned or that his sentence be mitigated.

Lord Cornwallis appreciated this fact fully and so he reformed the lower courts also. The former Fozdary Courts presided over by the Muslim Law Officers were abolished and new courts, known as the Court of Circuit, were established in their place. All districts in Bengal, Bihar and Orissa were arranged into four divisions of Patna, Calcutta, Murshidabad and Dacca. A court of Circuit consisting of two company's

covenanted servants, was established in each division to try all criminal cases.

The Court of Circuit was not a stationary but a moving court. It was to proceed from district to district within the division trying persons accused of criminal offences. In this way, there were to be two gaol deliveries annually, beginning from the Ist March and Ist October and the Court of Circuit was thus expected to visit each district within its jurisdiction twice a year to dispose of criminal cases awaiting trial. The court of Circuit was to be assisted by Muslim Law officers, Kazi and Mufti. A security of tenure was given to these law officers, the like of which they had not enjoyed before. They were to be nominated by the Governor General in Council. It was laid down that the Kazis and Muftis culd not be removed from their posts except by orders of the Governor General in Council, on proof to his satisfaction of their having been incapable or having been guilty of misconduct.

The proceedings and records of all those cases, where the sentences of death or perpetual imprisonment were to be inflicted, or where the judges of the Court disapproved of the futwa proposed by the native law officers, were to be reported to the Sadar Nizamat Adalat, which was to award the final sentence.

The lowest rung of the ladder of the criminal judicature were the Magistrates in the districts. The Collector in each district was to act as the Magistrates also. In fact, much of the success and vitality of the new system depended on their efficiency because it was for them to bring offenders before the courts of Circuit for trial. Upon a person filling a written complaint accusing a person of having committed an offence, and the complainant taking oath as to its correctness, the

Magistrate was to issue a warrant for the arrest of the accused, specifying the nature of the charge in the warrant. When the accused was arrested, the Magistrate was to hold an inquiry into the circumstances of the crime alleged against him. For this purpose he was to examine the complainant, the accused (not on oath), and other persons having knowledge of the crime.

If the Magistrate found the suspicion against the suspect wholly unfounded, he was to discharge him. If the offence committed turned out to be petty, the Magistrate could himself award the sentence of corporal punishment not exceeding 15 rattans or 15 days imprisonment. If the crime appeared to be serious, the accused was to be tried by the Court of Circuit when it visited the district next time. In the meantime, the Magistrate was either to commit the accused to prison or release him on bail, depending upon the nature of the crime; persons suspected of committing murder, robbery, theft, house breaking were not to be admitted to bail.

The Magistrate was to give a public notice in his district, of the time of arrival of the Court of Circuit, and require all complainants, witnesses and the accused released on bail, to attend when the court arrived. The Magistrate was to submit to the court, on its arrival, a calendar of all persons held in prison or released on bail, with copies of charges against them and the proceedings of the inquiries held by him.

Every month the magistrate was to make a report to the Sadar Nizamat Adalat specifying the names of the persons apprehended by him, dates of their apprehension, and orders passed thereon.

As regards arrest of the Englishmen accused of crimes in the mofussil, it was now provided that the magistrates would

take oath before the Supreme Court and qualifying themselves as the justice of the peace in which capacity they became entitled to arrest the European British subjects if accused of crimes.

The office of the remembrancer created during Hastings regime was now abolished.

Cornwallis suggested payment of liberal salaries to the various judges and officers engaged in the administration of criminal justice so that men of character and ability could continue in these offices and their necessities might not influence them adversely. The new criminal justice system expenditured 1.39 lacs rupees.

(b) Reforms in Criminal Law

All Nizamat Adalats were to decide cases according to Mohammedan Law of Crimes as modified by the plan of Cornwallis to make the law more reasonable and humane. Following changes were introduced in criminal law :

1. For determining punishment 'Intention' must be seen instead of "manner or instruments" by which offence was committed. This change bears much importance because the 'intention' is the first and foremost aspect seen in the offences defined in the Indian Penal Code.
2. The relatives of the murdered person could not pardon the accused. In other words, the idea was that every citizen is the property of State as existing in modern criminal justice system.
3. In case of murder, refusal by the relative to prosecute the accused or non appearance of the relative in the court in proceedings resulted into acquittal as a rule existing previously was abrogated in 1792 so that no pressure tactics of accused be operated.

4. In 1791, the punishment of mutilation of limbs was abolished and in place of it provision was made of imprisonment and hard labour.

5. Crimes of forgery and perjury were taken very serious hence recommended to be punished by branding on forehead in addition to the ordinary punishment.

The sincerity of Lord Cornwallis can be seen from his letter written to Dundas in 1799.

"The administration of criminal justice is oppressive, unjust and beyond measure corrupt and I see no remedy but by appointing 3 or 4 judges for Bengal and Bihar from the Company's senior servants, who would go on 'Circuit' twice a year and superintend the trials and be particularly careful that the sentences should be extended on those who are found guilty and that the innocent should be released".

F. Evaluation : Thus the scheme of 1790 had three limbs. At the lowest rung of the ladder were the Magistrates in the districts. Above them were the Courts of Circuit and the ultimate court was the Sadar Nizamat Adalat.

The new scheme was expected to produce happy results in suppressing crimes and affording security of life and property.

The new Criminal Courts marked the abolition of the last vestiges of the Nawab's sovereignty.

The new scheme was based on the principle of checks and balance; the Magistrates were to discharge important functions but subject to the control of the Courts of Circuit. The Courts of Circuit were to try serious offences meriting death sentence, final orders were to be passed only by the Sadar Nizamat Adalat.

Benerjee said – "That the scheme put the whole system on a sounder footing and ensured to some extent the security of life and property."

Keith stated as "A defect was the huge amount of work which the Court of Circuits were called upon to handle, the reason for this was that the powers of magistrates were very meagre".

G. Further reforms upto 1793

In 1792, Government sanctioned payment of a small daily allowances to all prosecutors and witnesses, in need of assistance, for the days they were in attendance in the Courts of Circuit and for the days taken by them during their journey to come from and return to their respective homes.

Another step taken by the Government in 1792 was relating to the prisoners, discharged from the prison after serving their term. As most of them found themselves completely without any support, they relapsed into crime after their release. The Govt. therefore, resolved to pay to all persons being released after a term of six months or more, a sum sufficient to maintain them for a month with a maximum of five rupees.

In 1792, the Government authorised the magistrates to hear and determine complaints of petty thefts when unaccompanied by any aggravating circumstances and to inflict corporal punishment for the offence upto 30 stripes or imprisonment not exceeding one month.

H. Reasons for Issuing the Scheme of 1793

Under the scheme of 1787, the Collector exercised practically unlimited authority, without any effective restraint. Cornwallis stated – "The idea of the officers of the Government of being able to commit oppression with impunity must be eradicated." The unlimited position was due to the

combination of revenue administration with the dispensation of justice in civil, criminal cases being one and the same person was the Collector. So much power made his uncontrolled authority. Cases relating to revenue were discharged in 'Mat Adalat'. All complaints for oppressions and undue treatments in the collection of revenue whether made by the collector or other person whatsoever, were to be cognizable by the Collector himself. In other words, the Collector himself was the judge in his own cause.

The Collectors did not discharge their judicial functions efficiently. They always regarded their work of collecting revenue as primary, and the task of administering justice only secondary. He received no salary as the judge of the Adalat of his district. He received a commission on the amount of the collection of revenue. The collection of revenue on which the Collector's promotion, credit and future career so much depended, naturally came to be regarded as the chief and foremost duty.

Keith stated -

> "Upon these grounds Cornwallis separated the judicial functions from those of revenue. This was the important change made in 1793. The famous code of 48 regulations known as Cornwallis code was passed."

The new judicial plan was based on the following postulates:–

1. The Executive Officers were to be divested of judicial powers ;
2. The function of administering justice was to be vested in persons distinguished by their integrity and ability. The dispensation of justice was to be their sole duty,

their attention not being distracted by any other public occupation;

3. The business of deciding revenue cases was to be assigned to the courts of justice. The Collectors of revenue were no longer to enjoy any judicial powers in any shape or form;

4. The Executive Officers were to be placed under the jurisdiction of the Courts of Justice, which could scrutinise their actions and award suitable redress if they infringed the regulations or abused or misused the powers conferred on them by regulations. The reasons necessitating this proposition, were pointed out in Cornwallis' own words as - "The idea of the .....officers of government of being able to commit oppression with impunity must be eradicated."

Thus, the new scheme advocated the principle of "Rule of Law".

I. The Scheme of 1793

According to Banerjee - "The scheme was based on certain postulates which today the civilised countries regard as essential and fundamental for the organisation of the judicature"

1. Separation of Executive and Judiciary

The policy of separating the two functions was put into practice by scheme of 1793. Accordingly, the regulation II of 1793 made inter-alia the following provisions :

i) The collector was to be responsible only for collection of revenue payable to the government. He, thus became merely administrative officer.

ii) The Courts of 'Mal Adalat' or revenue courts, were to be abolished. The trial of suits which up to this time

had been cognizable in those courts as well as all judicial powers heretofore vested in the Collectors of the revenue were to be transferred to the Courts of Diwani Adalat. Revenue cases became triable like ordinary civil causes in ordinary civil courts.

2. Executive Subjected to Judicial Control

The Collectors and all executive officials were made amenable to the Diwani Adalats for their official acts; they were to be personally liable for violations of the regulations and could be required to pay damages to the injured party.

In reality, heretofore if they committed any oppressive acts, the injured had no means of obtaining redress except the uncertain, dilatory method of petitioning the government at Calcutta.

3. British Subjects v. The Company's Courts

The British subjects most of whom were merchants and traders, resided for commercial purposes in the interior of Bengal, Bihar and Orissa, beyond Calcutta, could recover their claims against the native inhabitants easily and inexpensively by filling their cases in the local Diwani Adalats. But on the other hand, the native inhabitants of these areas had no such reciprocal means to obtain redress against the British subjects against whom cases could be filed only in the Supreme Court at Calcutta. This made the situation extremely inequitable and amounted to a denial of justice to the Indians when wronged by the British Subjects. Cornwallis himself stated, "To render the remedy of the weak against the strong so difficult, whilst the former are unabled to obtain redress against the later with such facility, is both unjust and impolitic."

To redeem this inequitable situation, the Diwani Adalat of mofussil area were authorised to entertain suits by natives

against British subjects involving upto Rs. 500 only in case where British subjects were residing at a distance more than 10 miles from Calcutta. A bond duly executed shall also have been taken from such British subjects to the effect of binding themselves as per decision pronounced. Further provided, if a British subject came as a plaintiff in an Adalat, he was to execute a bond declaring himself subject to the Adalat's jurisdiction for the suit in question, and binding himself to abide by the verdict of the Adalat. It may be noted that non British Europeans residing out of Calcutta were already amenable to the Mofussil Diwani Adalats. It was, however, of a limited efficacy, as if claims over 500 rupees against the British subjects had still to be instituted in the Supreme Court and not in the Company's adalats.

4. Mofussil Diwani Adalats Reorganised

The Mofussil Diwani Adalats under the collector had not been functioning properly.

A Diwani Adalat was instituted in each district and in each of the three cities of Patna, Murshidabad and Dacca. It was to be superintended by a Company's covenanted civil servant. The Mofussil Adalat was authorised to take cognisance of all civil and revenue cases. But was not to interfere with Criminal cases. The scheme of application of various laws was to be same as had been finalised in 1781.

A few provisions, were made to render the Diwani Adalats regular, efficient and impartial. No rule, order, proceeding or decree was to be made by an adalat except on court days and in open court. A party could make a representation to the Adalat in writing either personally or through an authorised Vakeel. Causes which arose prior to the 12th August 1765 were not to be entertained by the Adalats.

Ordinarily, the period of limitation was fixed at 12 years for institution of fresh suits.

Till 1793, appeals from the Mofussil Diwani Adalats used to lie to the Sadar Diwani Adalat in cases over Rs. 1000. Individuals desiring to appeal to the Sadar Diwani Adalat had to undertake long journeys to go to Calcutta and had to incur huge expenses by engaging a vakeel and paying other charges. Further, till now, all cases below 1,000 rupees were non-appealable and so people were forced to remain silent and helpless.

5. Four Courts of Appeal

Keeping in view the above situation, four courts of appeal were instituted namely : Provincial Courts of Appeal having seats at Patna, Dacca, Calcutta and Murshidabad. Each Court was to consist of three Company's English covenanted servants, of whom two were to make a quorum. These courts were to discharge following functions : (a) to try civil suits sent to them for trial by the government or the Sadar Diwani Adalat ; (b) to receive original suit or complaints which a Mofussil Diwani Adalat might have refused to receive or proceed in, and to cause such adalat to hear and determine the same; (c) to receive charges of corruption against the judges of the Mofussil Diwani Adalats to forward them to the Sadar Diwani Adalat; (d) to hear appeals, if filed within three months from all decisions of the Mofussil Diwani Adalats. All cases decided by the District Adalat (i.e. Mofussil Diwani Adalats) irrespective of their monetary value, were now made appealable to these newly instituted appellate courts. A further appeal lay to the Sadar Diwani Adalat in all cases involving over one thousand rupees. It means the decision of Provincial Court of Appeal was final in cases involving upto Rs.1000.

6. Functions of Sadar Diwani Adalat

(a) It was to hear appeals from the Provincial Courts of Appeal in all cases involving a subject matter exceeding one thousand rupees. Its decisions were to be final, except that a further appeal could be taken to the King in Council in cases of a value of £ 5,000 or more.

The Sadar Diwani Adalat was given functions of supervision and inspection over the lower adalats. In this respect, the powers of the Sadar Adalat were to be :

(b) It might receive any original suit or complaint cognisable by a Mofussil Diwani Adalat if the particular Mofussil Adalat had refused or omitted to proceed with the case. (c) It could direct the Provincial Court of Appeal to receive and proceed with an Appeal cognisable by it, if it had omitted or refused to do the needful. (d) It was authorised to receive charges of corruption against the judges of the Mofussil Diwani Adalats and the Provincial Court of Appeal. It could try the charges itself, or it might issue a special commission to three or more judges of other Provincial Courts to try the charge, if it was against a judge of a Provincial Court of Appeal; or order a Provincial Court of Appeal to try it if it happened to be against the judge of a Mofussil Diwani Adalat.

7. Subordinate Civil Judicature

Hitherto, no effort had been made to organise a subordinate judiciary in the districts, and the whole judicial business of a district had been concentrated in one Mofussil Diwani Adalat. The parties had thus to undergo much expense and inconvenience.

The Mofussil Diwani Adalat was authorised to refer to its (1) Register (the officer in the Adalat) such suits for money or personal property upto a value of Rs. 200. (2) Further to

bring justice nearer to the people, Mofussil Diwani Court was authorised for issue of commissions to landholders, farmers, tehsildars etc., appointing them as 'Munsiffs' to try suits up to Rs. 50 in value. (3) A provision was also made for issue of commissions by the Mofussil Adalats, with the approval of the Sadar Adalat to respectable Hindus and Muslims appointing them a 'Ameens' a cadre junior to the Munsiffs. An Ameen could also try a suit up to fifty rupees. (4) Commissions were also to be issued for appointing Indians as arbitrators to whom parties could go directly. His decision could be enforced only by the Adalat and not by him directly. On the whole justice facility was provided by instituting the courts of (i) Register (ii) Munsiff (iii) Ameens (iv) Arbitrators but their decisions became final only after countersign by Mofussil Diwani Adalats.

8. Court Fees Abolished

Before 1793, court fees on a sliding scale between 2% to 5% in proportion to the cause of action had to be paid by a person instituting a suit.

In his anxiety to make justice easily accessible to all, Cornwallis took a radical step of abolishing the Court fees, yet many apprehended that abolition of court fees would raise the number of suits coming before the courts. But in Cornwallis's opinion, people were not litigious by nature.

9. Criminal Judicature

The scheme of criminal judicature introduced in 1790 was left intact subject only to a few changes made in 1793. These changes became necessary to achieve co-ordination between the schemes of criminal and civil judicature. These were the following modifications : –

(1) In 1790 collectors were to act as Magistrates. But with the policy adopted in 1793 of depriving the collectors from judicial power, and keeping them merely an executive officers, magisterial functions were now transferred to the judges of the Mofussil Diwani Adalats.

(2) The judicial powers of the magistrates were re-defined. Petty offences could be punished by them by imprisonment upto 15 days or by imposing a fine upto Rs. 100.

(3) The Courts of Circuit established in 1790 and the Provincial Courts of Appeal being established in 1793 were merged to create four courts of Appeal and Circuit.

(4) The practice hitherto hand been for the suitors either to plead their own causes personally or appoint agents. These agents could either be their servants or dependants, or those who followed the profession of a vakeel.

The innovation made by Cornwallis in 1793 was to create, recognize and organise the profession of lawyers or vakeels on a regular and sound basis. Cornwallis took the first step in this direction.

10. Legal Profession

The Sadar Diwani Adalat was to admit as many pleaders as were necessary to plead the causes of the litigants in various Adalats. The Sadar Adalat was to grant, sunnuds to the pleaders. The persons of good character, liberal education and versed in the knowledge of Hindu Law and Mohammaden Laws were admitted to profession. The Sadar Diwani Adalat could fine him, dismiss him or allow him to resume his practice in cases of misbehaviour alleged to have been committed by pleader.

To protect the clients from being exploited by the vakeels; it was laid down that they were not to realise their fees

directly from their clients; the court were to collect their fees as a part of the decree passed by them and pay to vakeels later on.

Scheme of 1793 also provided the liberty of institution of suits against government in case of violation of Regulations, laws. Hence a citizen could file the suit against the Govt.

11. Native Law Officers

Since 1772, the Native Law Officers, Pundits, Kazis, and Muftis, had been playing a significant role in the administration of justice as they expounded the principles of personal laws applicable to the cases tried by the English Judges. The judicial scheme of 1793 continued the practice but in view of the significant role played by these officers in the judicial machinery, certain rules were made to ensure that these offices were filled by men of integrity, well versed in the laws, that they were also given a security of tenure.

The Scheme of 1793 provided that all native law officers belonging to the various courts were to be appointed by the Governor General in Council. Persons well versed in the laws and of unblemished moral character were to be appointed as law officers who were to take an oath on appointment. They were to have a security of tenure in so far as they could not be dismissed from their office except for incapacity, misconduct in the performance of public duty. In the first instance, the court to which the guilty officer was attached was to take cognisance of the charge and take disciplinary action against him but an appeal could go upto the Sadar Diwani Adalat. The final authority was the Governor General in Council.

12. Legislative Methods and the "Form of Regulations"

Since 1772, Bengal, Bihar and Orissa had been ruled through regulations made by the Government at Calcutta, but

there did not exist as yet any general code of these regulations - which could be available for the people, lawyers and judges.

Cornwallis desired to effect some reforms in the legislative methods and forms with a view to ensure that the regulation making power was exercised in a more formal manner. With this in view the scheme made a few provisions. Henceforth, each regulation was to have a title expression of its subject as concisely as possible. A regulation was to contain a preamble reciting the reasons for its enactment. Every regulation was to be divided into sections and where necessary, a section could be divided into clauses. The sections and clauses were to be numbered. The subject of each section and clause was to be inserted opposite to it in the margin, as concisely as possible. All regulations enacted in a year, were to be recorded in the Judicial Department and then numbered, printed and published. The regulations enacted during a year were to be bound in volumes; a sufficient number of these volumes were to be sent to the courts and other functionaries.

J. Cornwallis v. Warren Hastings

1.Civil Justice : The scheme of 1793 introduced by Cornwallis, was in a way, the culmination of the process which had been initiated by Warren Hastings in 1772. Warren Hastings had sought to implant the Company's sovereignty in the Diwani territory, to assume full responsibility by the government of the area and thus abolish the mistaken system of dual government introduced by Clive in 1765. Cornwallis through his judicial reforms completed this constitutional change.

2. Criminal Justice : In 1772, Hastings had assumed the responsibility for administering civil justice. He had, by and large, left the administration of criminal justice to the Muslim

Law officers, except the magisterial functions were entrusted to English officers and the office of 'Remembrancer' was created to supervise the criminal judicature. Cornwallis took the next logical step and achieved in the field of criminal judicature what Warren Hastings had done in the filed of civil judicature.

3. Separation between Executive and Judiciary : The separation, between revenue and judicial functions had been foreseen and even partially implemented by Warren Hastings in 1780. The bifurcation between these two functions was not then complete in so far as decision of revenue cases had been still left to the revenue officers. In 1793, Cornwallis completed this process by effectuating a complete divorce between revenue and judicial functions and by transferring revenue cases to the Adalats dealing civil cases uptil now.

4. Sovereignty of Law : Further, the step taken by Cornwallis to subject the executive to judicial control was something which Warren Hastings had never imagined. It was Cornwallis who for the first time enunciated in India the principle of 'Sovereignty of Law', or rule of law made it a living principle, gave it a practical shape.

According to view expressed in the Cambridge History of India :

> "Although the policy that Cornwallis came to enforce in 1786 was new, it was not wholly new. In every direction Cornwallis built on the foundations already laid or begun to be laid by his predecessors and specially by Hastings. It was the emphasis rather the principle".

K. Evaluation

In the face of such a powerful Advocacy and earnest pleading, Company paid a tribute to Cornwallis for his magnificent achievement.

Cornwallis's reforms of 1793 were based on two basic postulates, viz, separation of the judiciary from the Executive and the subjection of executive to judicial control (Rule of Law).

The new system was based upon the principle of checks and balances and no functionary exercised any authority now without supervision from a higher authority. The executive officers were amenable to courts, and were personally liable, for their official acts. On the judicial side, a large system of supervision and appeals was introduced : Mofussil Diwani Adalats were put under the Provincial Courts of Appeal, which in their turn were subject to the control of the Sadar Diwani Adalat. The Munsiffs and Registers, were under the superintendence of the Mofussil Diwani Adalats. The Magistrates acted subject to the control of the Court of Circuit which were supervised by the Sadar Nizamat Adalat.

All his various measures were enacted on May 1, 1793, through a set of 48 Regulations which were all collected, compiled and printed in a single code which in latter years came to be known as the Cornwallis Code. This code was drafted by George Barlow.

It may also be noted that the principle of separation had not been applied by Cornwallis to the Sadar Adalats. Even at the lower level, Munsiffs were to be selected mainly form amongst the Zamindars.

The judicial arrangements of 1793 were expected to cost an additional sum of four lacs of rupees. Cornwallis

knew that the Company was in a mood not to incur additional expenses but to reduce the administrative costs. It was in his opinion, unjustifiable towards the peoples who paid so much revenue, and from whom company was deriving a huge profit.

A conspicuous defect in the reforms introduced by Cornwallis was the exclusion of Indians from any effective share in public administration. Cornwallis started with a wrong premise that the Indians from their 'character and bearing' were unworthy of holding any position of responsibility and trust. As a result of this policy, in his judicial systems of 1790 and 1793, all responsible positions went to the Britishers; the Indians could act only as Munsiffs to decide civil cases upto Rs. 50 and as law officers to expound the principles of the Hindu and Muslims Laws.

The Directors had yet stated "When the talents of the more respectable natives can with propriety and safety be employed in the management of the country, we think it is both just and politic to carry that principle into effect." Thus it may be noted that the policy enunciated by the Directors in this regard was completely ignored by Cornwallis.

Cornwallis left India immediately after Plan of 1793. Yet it continued to operate in India for quite some time. Edward Thomson states about the contribution of Lord Cornwallis –

> "The Governor-Generalship of Lord Cornwallis which extended from 1786 to 1793, constitutes a very remarkable and highly constructive period in the Indian Legal History. After the lamentable rule of John Macpherson which extended only 20 months; Lord Cornwallis, who has already established his reputation as a man

of honesty and integrity, reached India in the beginning of Sept. 1786."

Thomas & Garratt opined :

"We must date from Cornwallis the definite Europeanisation of all higher posts in the administration... In a very short time, the native inhabitants of British India were left without any worthy objects of ambition."

CHAPTER – X

PROGRESS OF THE ADALAT SYSTEM AFTER LORD CORNWALLIS (1793-1835)

Introduction

After the judicial scheme or plan of 1793 introduced by Lord Cornwallis, a series of Governor General came in India under whose guidance the adalat system continued to develop. Here we will discuss the contribution of various Governor Generals in a sequence.

SIR JOHN SHORE

Lord Cornwallis left the country in 1793 itself therefore he could not see the proper working of his scheme of 1793. In his place, Sir John Shore came as Governor General of Calcutta. As per letter of the Governor General in Council dated Dec. 29, 1794, Sir John Shore praised the system which Lord Cornwallis had introduced. It was mentioned in the letter "the judicial system proceeds well. I am satisfied that His Lordship's plan was solid, wise and proved beneficial to the country". Therefore, Sir John Shore made some little changes without touching the basic scheme of 1793.

The most important difficulty among others under the scheme of 1793 was the successive increase in the arrears of work in the courts of law. For instance, in 1795 there were 30,000 cases pending in the Diwani Adalat of Burdwan with highly increasing of institution of the original cases in which condition the decision was expected to come out in 8 to 10 years. The foremost reasons of arrears of work were as follows :

(i) Existing provision for more Appeals – Generally, the provision was at least for two appeals and in some cases

three appeals were allowed against the decision. Resultantly, the appellate courts were overburdened with appellate work, hence could not dispose of their work of original side.

(ii) Limited pecuniary jurisdiction of lower courts – Munsif's court had the jurisdiction to decide the cases only upto Rs. 50. Similarly the Registrar's Court had the jurisdiction upto Rs. 200. Still the decisions of both the courts were supposed to be countersigned by the Mofussil Diwani Adalat for making them final. In other words, the respective decisions were needed the counter signature of Mofussil Diwani Adalat then they could become effective or executable. Hence, Diwani Adalat remained busy in these petty matters as well in matters of original side.

(iii) Lengthy procedure of Courts

All cases were decided by the same procedure whatsoever the nature of the cases were (i.e. intricate or simple case). No summary procedure was available for petty cases. Hence the procedure was lengthy and dilatory. Such procedure obstructed the collection of land revenue as the Mofussil Diwani Adalat was also exercising the power to decide the revenue disputes.

The Governor-General Sir John Shore was not in favour of increasing the number of the courts. He made certain changes in the years (1794, 1795 and 1797 to face the problem of arrears of work in the courts.

Changes in the year 1794

By making regulations in 1794 following changes effected in the judicial administration–

1. The work of Mofussil Diwani Adalat was lessened upto some extent. The decree of the Registrar was made final or executable upto Rs. 25/- in money suits and suits pertaining to personal property with a provision to file revision before the Mofussil Diwani Adalat which could set aside the decision. Cases involving real property and those exceeding Rs.25/- a direct appeal was allowed to Provincial Court of Appeals hence first appeal to the Mofussil Diwani Adalat was abolished.
2. To give some more relief to the Mofussil Diwani Adalat in revenue work, provision at discretion was made to refer the matters relating to revenue or rent to the Collector for his report. The Collector was to submit his report then the matter was decided by the court.

Changes in the year 1795

By Regulation XXXVI of 1795 following changes were introduced to decrease the arrears of work :

1. Under the scheme of 1794, the provision of appeal from Registrar's decision to the Provincial Court of Appeal was abolished and in its place the Mofussil Diwani Adalat was empowered to hear all the appeals as final court of appeal against the decision of the Registrar.
2. The existing provision of two appeals - first to the Mofussil Diwani Adalat and then second appeal to the Provincial Court of Appeal against the decisions of the Munsif's court was abolished and only one appeal from the Munsif's Court decision to Mofussil Diwani Adalat was provided as its decision will be deemed as final. No further appeal was to be instituted.

3. By Regulation XXXVII of 1795, the supervisory powers of the Sadar Diwani Adalat were increased as the Registrar of the Sadar Diwani Adalat was to prepare a monthly report regarding number of cases decided by the judge of the Diwani Adalat, Registrar, Munsif and appellate decisions by Provincial Court of Appeals. Furthermore, after every six months a report was also to be compiled by the Collector showing the number of pending cases before the above courts with previously prepared comparative table. Reasons were supposed to be asked from above various courts about delay in old pending cases. Undoubtedly this regulation caused the efficiency in the court's functioning.

4. By Regulation XXXVIII of 1795 the court fee was reimposed as it had already been abolished under the scheme of 1793. He considered this step necessary to minimise the litigation. But the rate of fee and stamp duty was extra ordinarily high and was chargeable at the institution of the matter as well as at several stages of trial and even at the stage of filling appeal.

Changes in the year 1797

By Regulation XII of 1797, the decision by Provincial Court of Appeal upto Rs. 5000/- were made final. Sadar Diwani Adalat was vested with the appellate powers to the cases beyond Rs. 5000/- in value. Certainly, the Sadar Diwani Adalat got considerable relief in its arrears of appellate work.

Extension of Adalat System to Banares :

Sir John Shore achieved another success as during his tenure the adalat system existing in Bengal, Bihar and Orissa in 1793 was extended to Benares province in 1795 with the

concurrence of Raja of Benares. The Benares province was divided into four districts viz., Benares, Mirzapur, Ghazipur and Jaunpur. At the pattern of other provinces, same courts were established in this province and ultimately appeals were decided by the Sadar Diwani Adalat at Calcutta. In Benares province special relaxation was given to Brahmins on the basis of caste as they could be at the most sentenced to transportation for life in place of sentence to death in lieu of any offence how so ever grave it might be. Another peculiar feature was that in a suit where any of the parties was a Hindu, the law applicable in that case was Hindu law and not the law of the defendant as in other provinces it was the law of defendant which was applied.

Appraisal of Sir John Shore's Reforms :

No basic changes were effected. To some extent arrears of work was lessened. Credit goes to Sir John Shore for extension of the Adalat System to the Province of Benares. The reimposition of court fees and stamp duty was criticised during and after his tenure which was considered an injustice step in the path of justice which is even today exists in modern judicial administration in India. Notable criticism made by the judge of Midnapore written as "Litigation may possibly have been checked by the fees and stamp duty, but I confess, I consider the charges too high. It will not .... be denied that it is desirable that the least tedious and the least expensive mode of obtaining redress should be open, where an injury has really been suffered. When a poor man has been oppressed, he should be free from trouble and expense, and assisted and encouraged as far as possible in prosecuting his complaint. He is not, in such a situation a fair object for taxation. It does not

become the ruling power, to and to his misfortune by levying impositions upon him. It clear that a ryot, from whom an increase of rent has been exacted, and instituting a suit for the same, must feel the charge of stamps and fees, to be a severe aggravation of his distress; nor can he console himself under the reflection that the impositions are intended to check litiguousness; or that, for certain reasons of finance, it is expedient he should submit to new exactions. The expense and delay to which ryots are subject in prosecuting their suits, are to may knowledge, excessive.... It must, I am sure, constantly happen, that a ryot gives up his prosecution in despair on finding the expense of continuing it, beyond his power to sustain. It is not the original fee on the institution of the suit, but the subsequent charges on exhibits and witnesses, that appear to me intolerable. I have often seen a suitor when stripped of his rupee, and called upon for the fee on a document, produced in court a silver ring or other trinket, and beg that it might be received as pledge; and after all, perhaps he was cast for want of money, to bring proof. I confess, I think such scenes in a court of justice, unpleasant to those who are entrusted with the administration of laws; and not very creditable to Government."

LORD WELLESLEY

In 1798, Sir John Shore was succeeded by Lord Wellesley. As regards, arrears of work, the problem was existing before Lord Wellesley. Lord Wellesley made some changes without disturbing the basic frame work made under the scheme of 1793 provided by Sir John Shore with a view to decrease the arrears of work before the courts. He made following changes during his Governor-Generalship :

1. Restriction on Appeals to Sadar Diwani Adalat

According to Regulation V of 1798 it was provided that the decisions pronounced by the Provincial Court of Appeal relating to land or other real property up to the value of Rs. 5000 would be final. Hence the Sadar Diwani Adalat was to hear appeals exceeding value of Rs. 5000. This change saved the time of Sadar Diwani Adalat.

2. Constitution of Sadar Adalats Changed

First of all it is necessary to know the existing positions of Adalats. The Sadar Adalats were viz. Sadar Diwani Adalat and Sadar Nizamat Adalat which were the final courts of appeal in India in civil and criminal cases respectively. Both were constituted by Governor General in Council. Governor General in Council had legislative, administrative work also to discharge. Hence Governor General in Council remained overburdened with work which resulted into paucity of time. The principle of natural justice that one cannot be a judge in his own cause was also violated because in many cases before the Sadar Adalats, the Governor General in Council was the party on one side. The pleaders prosecuting appeals against the Government were remained fearful because they were complaining the working of the Government before the Government with a pretended name of Sadar Adalats. The Sadar Adalats hold their working as camera proceedings and not in open.

In the above mentioned circumstances Lord Wellesley made some important changes. By Regulation II of 1801 he changed the Constitution of the Sadar Adalats. It was provided that the Sadar Diwani Adalat and the Sadar Nizamat Adalat

will be presided over by three judges appointed by the Governor General in Council. The Chief judge of the Adalat was to be a member of the Council (i.e. Councillor) but not being the Governor-General or the Commander-in-Chief. The remaining two judges were appointed as covenanted servants of the Company having judicial experience of Provincial Court of Appeal. The quorum was fixed with at least two judges and to work in open. As regards superintendence over lower courts, the Sadar Adalats were empowered to suspend any judge of any of the lower courts for willful disobedience or negligence, misconduct in discharge of his official duty. After completing enquiry against such judicial officers of lower courts the report was to be submitted to the Governor General in Council for necessary action in this regard.

3. Changes in Lower judiciary :

(i) Assistant Judge on ad hoc basis

With a view to ease the burden of work of the District Diwani Adalats, by Regulation 49 of 1803, it was provided that an ad hoc judge will be appointed to assist that District Diwani Adalat in which there is pending work. The Assistant judge was to decide cases referred by the Diwani Adalat. The Assistant judge would be relieved when pendency of work was reduced.

(ii) Jurisdiction of Registrar enhanced

The jurisdiction was enhanced from Rs. 200/- to Rs. 500/- yet the appeal could lie in cases involving value of Rs. 100 to the District Diwani Adalat and in the cases of higher amount, a further appeal lay to the Provincial Court of Appeal.

(iii) Appointment of Sadar Ameens

A new cadre known as Sadar Ameen appointed out of Indian Judges, was created to decide the cases upto the value of Rs. 100/- involving money or personal property. The appointment was made by District Diwani Adalat with the approval of the Sadar Diwani Adalat. The qualifications fixed were viz, good character and ability. As regards security of tenure, he could be removed by the Sadar Diwani Adalat on proved sufficient cause. As regards his salary, he was not a regularly paid servant rather he was paid a commission of one anna per rupee in cases decided by him. The decisions of Sadar Ameen could go in appeal to the District Diwani Adalat.

(iv) Appointment of Munsifs

Lord Cornwallis by his scheme of 1793 had established the cadre of Munsifs which brought good results. Court of Munsifs continued during Lord Wellesley with their same jurisdiction except with little changes. Under the scheme of 1793 appointment of Munsifs was restricted only to Zemindars, land holders etc. Lord Wellesley in 1803 provided that the appointment of Munsifs be made by District Diwani Adalat with the approval of the Sadar Diwani Adalat out of persons of good character, sufficient ability, well qualified and good experience.

(v) Adalat System in Oudh and other areas

On March 24, 1803, the Adalat system was initiated in the province of Oudh. Like in other areas, appellate provision to Sadar Adalats at Calcutta was provided.

The scheme was also introduced in Aligarh, Saharanpur, Agra and Bundelkhand in 1805.

As regards judicial reforms made by Lord Wellesley, the change in the constitution of the Sadar Adalats bears importance yet the Chief Judge of the Adalat was still a Councillor. Credit goes to Lord Wellesley on account of creation of Sadar Ameen's court and more inclusion of Indians in judicial work.

LORD CORNWALLIS

Lord Cornwallis came in India for the second time in July 1805 and died in the following October in India. During this short period of four months, he made change in Chief Judgeship of Sadar Diwani Adalat and Sadar Nizamat Adalat. The holding of Chief judgeship exclusively by a Councillor was done away and in place of it any person otherwise qualified could be appointed as chief justice.

LORD MINTO

After the death of Lord Cornwallis in October 1805, Sir George Barlow, the then senior member of the Council took the charge as acting Governor General in his place. In July 1807 Lord Minto joined as Governor General and Sir George Barlow resumed his own office as Councillor. Lord Minto continued as Governor General upto 1813. During his tenure he did not make any substantial changes except few hereinafter mentioned –

1. **Structure of Sadar Diwani Adalat changed**

Regulation XV of 1807 was passed which provided increasement of number of Judges from 3 to 4. As regards, Chief Judge of Sadar Diwani Adalat, the policy of Lord Cornwallis made in 1805 about separation of

the executive from judiciary was reversed. Henceforth the Chief Judge of the Adalat was to be member of the Council excluding Governor General or the Commander in Chief. Number of the judges was again touched by a new Regulation in 1811. By this Regulation it was provided that the number of Judges would be as many "as may from time to time appear necessary for the despatch of business of these courts." Hence the number of judges might be increased as the demand require.

2. Change in Criminal Administration

The existing position was arrears of work before the courts being few courts having large number of pending cases. The existing criminal court was known as circuit court which used to come on the circuit twice a year. The criminals kept in wait in jails for their fate. To solve the problem of arrears of work following steps were taken.

A. Powers of the Magistrates increased

As the judge of the District Diwani Adalat was used to work as Magistrate in those days. The powers of Magistrate was increased by Regulation IX of 1807. Accordingly, the Magistrate was empowered to award sentence upto six month's imprisonment with corporal punishment upto 30 Rattans and a fine maximum upto Rs. 200. In case of non payment of fine, a further imprisonment upto six months was provided.

B. Appointment of Joint and Assistant Magistrate

To ease the problem of pending work before the courts, by Regulation XVI of 1810 the provision was made for the appointment of Joint and Assistant Magistrates by the

Governor General in Council in addition to the District Magistrate (i.e. Judge of the District Diwani Adalat who was also exercising the powers of District Magistrate). Governor General in Council was to direct the limits of their jurisdiction but one thing was sure that joint or Assistant Magistrates were to be work under subordination of the District Magistrate. The District Magistrate of one District could be appointed as a Joint Magistrate in other contiguous District as the volume of work needed so. Apart from other persons, the Superintendent of Police of Calcutta, Dacca, Murshidabad, Patna, Benares and Bareilly could be appointed such Magistrates in any District. Interesting fact is that police official could also act as judicial official.

3. Creation of Original Jurisdiction of the provincial Court of Appeal

Under the previous position provincial Court of Appeal was a court of appeal only. But by Regulation XII of 1808 it was granted the original jurisdiction also in cases exceeding the value of Rs. 5,000. The cases involving value upto Rs. 5,000 were to be decided by the District Diwani Adalat. Henceforth, Provincial Court was given original jurisdiction in addition to appellate powers against District Diwani Adalat. Also an appeal could go from Provincial Court of Appeal to the Sadar Diwani Adalat.

4. Reference to Collector by District Diwani Adalat

According to Regulation V of 1812 it was provided that all suits relating to revenue matter instituted in the District Diwani Adalats were primarily to be referred to the Collector (i.e. an executive authority) for his report.

Such reference was also necessary in cases instituted by the aggrieved persons involving distraint proceedings taken by the Zemindars. Yet the final disposal of the cases was to be pronounced by the District Diwani Adalat. Still the reference to the Collector was against basic principles of fair justice.

LORD HASTINGS

In place of Lord Minto, Lord Hastings took the charge of Governor General in 1813. The scheme of 1793 introduced by Lord Cornwallis was continued uptil now with little changes. Lord Hastings made some very important changes in the administration of justice. The judicial administration was suffering with following defects

1. Arrears of work

Arrears of work pending for several years caused delay in disposal of cases.

2. Breach of Law and Order

People had lost faith in judiciary being overloaded with work therefore, started to take the law into their hands. Cases of breach of peace, murder, dacoity, robbery etc. increased.

3. Problem of Ryots

Because the regulation VII of 1799 made by Lord Wellesley according to which the Zamindars were authorised to sell the property of the Ryots or to keep them in detention for the purpose of collection of the land revenue. The Ryots had only remedy to institute suit in District Diwani Adalat against any oppression made by Zamindars but because the Adalat had lot of pending work could not provide justice to the Ryots.

4. Bribe or Corruption

For getting early justice people started to give bribe to the judicial officers and staff.

5. Non execution of Decrees

Due to over work of pending cases, the decrees could not be executed for number of years which frustrated the very purpose of the justice.

6. Extremely Large Territorial Jurisdiction

The main court for the entire district was the District Diwani Adalat which used to deal with civil, criminal and revenue work which was presided over by single judge. One example of large territorial jurisdiction is that there was no district between Kanpur and Allahabd which were 129 miles at distance from each other. Peoples suffered problem of huge amount of fare, time and safety.

7. Few Criminal Courts

The criminal courts were the Circuit Courts four in numbers working in Bihar; Bengal and Orissa; Benares; Oudh. The Circuit Court had to deal with entire criminal work of circuit. In addition to it, these courts were also to act as Provincial Court of Appeal in civil cases. Circuit Court consisted of three judges visiting one place to another place. This situation resulted prisoners staying for long time in jail without hearing, innocent persons detained in jails, lost of evidence, non-availability of witnesses at the hearing.

8. Difficulties Before English Judges

The entire criminal administration of justice was with English Judges who could not understand the local conditions, customs etc. The bad situation was

observed by a Circuit Judge in a report that "We cannot study the genus of the people, in its own sphere of action. We know little of their domestic life, their knowledge, conversation, amusements, their trades, castes, or any of those national and individual characteristics which are essential to a complete knowledge of them. Everyday affords us examples of something new and surprising; and we have no principle to guide us in the investigation of facts, except an extreme difference of opinion a consciousness of inability to judge of what is probable or improbable."

In the above situation Lord Hastings made some basic changes in the existing scheme of 1793 in two shifts i.e. in 1814 and in 1821 which are discussed below :

Reforms in Civil Administration

(i) Rate of Court fee Increased

By Regulation I of 1814 Court fee was increased and also made provision for different duties and stamps required at all stages of proceedings in a case. In this way Lord Hastings followed the view of Sir John Shore.

(ii) Changes in Court of Munsilfs and Sadar Ameens

The number of Munsifs were increased so that there was to be one Munsif for one Thana (i.e Police Station). In 1821 the provision was made for more munsifs for one Thana if there was necessity. Munsifs were put under the supervision and control of the Provincial Court of Appeal. In 1814 the pecuniary jurisdiction of Munsif was increased from Rs. 50 to Rs. 64 and in

1821 it was enhanced upto Rs. 150. Other provisions relating to Munsiff remained continue.

The pecuniary jurisdiction of the Sadar Ameens enhanced from Rs. 100 to Rs. 150 in 1814 and in 1821 it was further increased upto Rs. 500. Court of Sadar Ameens were put at liberty to hold their courts at any place within their territorial jurisdiction as the earlier position was to hold their courts at District headquarters only. These courts were also empowered to hear appeals against the decisions of the Munsifs if it was so referred to them by the District Diwani Adalat.

Due to above mentioned changes the Indians were given more chance in judicial administration. But one disparity was sustained that whenever any of the party was an European; or British or American the District Diwani Adalat was only to entertain the matter and the Munsifs or Sadar Ameens were not so empowered to entertain the matter. It was a new limitation introduced by Lord Hastings. The Indian Judges working in the Courts of Munsifs and Sadar Ameens were still to take commission according to the valuation of the suit decided by them rather any regular salary.

(iii) Changes in Provincial Court of Appeal

The number of judges was increased from three to four for the purpose of more efficiency. The Provincial Court of Appeal was also provided with original jurisdiction in cases exceeding Rs. 5,000 in value. For the first time, qualifications of the Judge of this court was provided as judge or Magistrate acted in the District Court for at least three years or any other

person who has discharged judicial functions (civil or criminal) for a period of at least six years.

(iv) Original jurisdiction of Sadar Diwani Adalat

The cases involving value of Rs. 50,000 or more could directly be instituted in Sadar Diwani Adalat. Further appeal could go to King in Council in England.

(v) Changes in Diwani Adalat

The posts of Assistant Judges in Diwani Adalat (i.e. District Diwani Adalat) were abolished. Qualifications for a Judge of Diwani Adalat were laid down as an Assistant Judge or a Registrar or a Joint or Assistant Magistrate for a period of at least 3 years or any other person having discharged judicial functions (civil or criminal) for a period not less than 3 years. By Regulation XXV of 1814 the Sadar Diwani Adalat was empowered to refer the pending cases of Diwani Adalat exceeding the value of Rs. 1000 to the Provincial Court of Appeal for disposal. The appeals against these decisions could go to Sadar Diwani Adalat.

(vi) Courts of Registrars Increased

Courts of Registrars were increased. They were permitted to hold their Court at any place within the District as uptil now they were bound to remain at District Headquarters. The Governor General in Council could vest the power to Registrar to hear cases exceeding valuation of Rs. 500. Further appeal could go to Provincial Court of Appeal instead of being made to the Diwani Adalat. The decisions of Provincial Court of Appeal in such appeals were made final. The Registrars were authorised to entertain appeal against

the decisions of the Sadar Ameens. The qualifications for the appointment of Registrar were prescribed as unless "he shall have obtained a certificate from the Council of the College of William, signifying that he is duly qualified to enter upon the public service in confirmation with the statutes of the College".

(vii) Provision of Arbitration in Land Disputes

By Regulation IV of 1813 Lord Hastings for the first time introduced provision for arbitration in matters relating to possession or dispossession of land. These Arbitrators could be appointed by the courts or the parties could themselves decide to refer the matter to the Arbitrator. The court was to give full force and effect to both the ways.

Reforms in Criminal Administration

A. Powers of Magistrates enhanced

By Regulation XII of 1818 the powers were enhanced as the Magistrates could award a sentence of imprisonment upto two years with hard labour and corporeal punishment upto 50 stripes.

B. Magisterial Powers to Indian Law Officers

For the first time, Lord Hastings authorised the District Magistrates to refer petty criminal cases to the Hindu and Muslim Law Officers who were attached to the Diwani Adalats and Sadar Ameens. They were empowered to try and decide these referred cases. The could punish upto one month's imprisonment and award corporeal punishment not exceeding 30 rattans.

C. Conferment of Magesterial Powers on the Collector

By Regulation IV of 1821 the Governor General in Council was authorised to confer the Collector or any other Revenue Officer with whole or any powers and duties of Magistrates.

Appraisal reveals the more participation of Indians in civil and criminal administration of justice. Arrears of work was reduced. But the bad step was the enhancement of the Court fee and the conferment of magisterial powers on the Collector. The scheme of 1793 had provided separation of revenue work from civil and criminal whereas Lord Hastings again intermingled the work by providing criminal powers (i.e. The Magisterial powers) to the Collector and other Revenue Officers.

LORD AMHERST

The Directors of the Company were not satisfied with the status given so far to the Indian Judges. After succeeding the Governor Generalship by Lord Amherst in place of Lord Hastings, the Directors of the Company wrote in 1824 two important principles to be taken in special consideration in future. First, the Indian Judges be given maximum representation in the administration of Justice. Second, the Indian Judges be given adequate salary and allowances on regular basis.

Lord Amherst on the basis of the above principles made following few reforms :

1. Sadar Ameens Benefited

   By Regulation XIII of 1824 it was provided that Sadar Ameens be given regular salary in place of commission given uptil now on the valuation of the suit. If the case

is referred to the Sadar Ameens by the Diwani Adalat, the Sadar Ameens would enjoy enhanced jurisdiction i.e. upto Rs. 1000. Also, The Europeans i.e. Britons, Americans) were subjected to the jurisdiction of the Sadar Ameens as they were not amenable till the period of Lord Hastings.

2. Unlimited Judges in Provincial Court of Appeals

   By Regulation I of 1826 it was provided that any number of judges could be appointed in the court taking into the load of work.

3. Vesting of judicial power to Collectors in Revenue Matters

   By Regulation XIV of 1834 the Collectors were empowered to try summarily and decide finally the matters relating to revenue which were referred to them by the Diwani Adalat. Because prior to this Regulation, the Collectors were used to send reports on the revenue matters referred by the Diwani Adalat. Still no suit could be instituted directly before the Collector. The execution of the orders of the Collector was effected by the Diwani Adalat. After the decision of Collector, any party could file a regular suit in the diwani Adalat about same matter.

Appraisal depicts that Indian Judges were given more representation. Sadar Ameens were paid salary and allowances on regular basis but Munsifs were still under commission system. Collectors were given judicial powers in revenue matters, it was not a good signal being Collector an executive officer.

LORD WILLIAM BENTINCK

The Governor Generalship of Lord William Bentinck starts from July 1828 and ends in March 1835. During this period he made many original reforms. He is considered next to Lord Cornwallis in context of basic reforms. He made following reforms :

Establishment of Sadar Diwani and Sadar Niamat Adalats at Allahabad

By Regulation VI of 1831 he established Sadar Diwani and Sadar Nizamat Adalats at Allahabad vesting the same powers as of Calcutta which started to work since January 1, 1832. The territorial jurisdiction of the new Adalats extended to Benaras Province and other areas including District of Meerut, Saharanpur, Muzaffarnagar and Bulandshar. This reform gave relief to the people living at far places from Calcutta. Now discussion is given about criminal, civil and revenue administration of justice.

A. Criminal Administration of Justice

1. Abolition of Circuit Courts

   Because the Circuit Courts were suffering with many defects such as arrears of work, vast area of territorial jurisdiction, ignorance about local circumstances etc. Therefore, Circuit Courts were abolished in 1829 and their jurisdiction was conferred upon Commissioners.

2. Establishment of the Court of Commissioner

   By Regulation No. I of 1829 the jurisdiction exercised so far by Circuit Court was transferred to the Commissioner who was called Commissioner of Revenue and Circuit. He exercised the power of superintendence and control over the Magistrates,

police, collectors and other revenue officers. The entire area was divided into divisions and for each division a Commissioner was appointed as chief of such division. Commissioner was under the control of the Sadar Nizamat Adalat regarding judicial functions and under the control of Board of Revenue regarding revenue functions. The Commissioner was empowered with the jurisdiction of abolished Circuit Court. Also, the Commissioner was the final appellate authority against the decision of Magistrates or Joint Magistrates. No further appeal or revision was allowed before the Sadar Nizamat Adalat in such cases. Court of Commissioner gave better result as it had smaller territorial jurisdiction than Circuit Court. For solving the problem of arrears of work, some new courts were established in 1831 which are discussed below.

3. Establishment of the Court of District & Sessions Judge
One division consisted of many Districts. In each District, District Diwani Adalat was working. By Regulation VII of 1831, the Government was authorised to invest the additional duty of Sessions to District Diwani Adalat. When the Judge discharged duties in District Diwani Adalat, he was called District Judge dealing with civil matters. When the same Judge sit in sessions (generally once in a month) he was called sessions Judge dealing with criminal matters. The Sessions Judge was having powers similar to above mentioned Commissioner. But the services of the Sessions Judge was taken when the Government felt that the Court of Commissioner was over loaded with

work and it was necessary to hold the sessions by Sessions Judge to reduce the pressure of work. The Sessions Judge tried those cases only which were committed by the Magistrates of the concerned area. Gradually the Commissioner's Court became overburdened with work and the court of Sessions Judge exclusively came up as permanent court in criminal cases. Even today the court of District and Sessions Judge is working in India.

4. Establishment of Court of 'Collector – Magistrate'

Lord Hastings in his scheme of 1821 had permitted the Government to empower the Collectors with magisterial powers but in fact the scheme was not executed. Lord Bentink executed the scheme hence the court of Collector – Magistrate was created.

5. More Participation of Indians in Criminal Administration of Justice

By Regulation of 1831 the Magistrates were authorised to refer any criminal case to Sadar Ameen or Principal Sadar Ameen for investigation. In 1832 these Indian officers (Sadar Ameen, Principal Sadar Ameen) were given the powers to award punishment of one month imprisonment with hard labour and corporal punishment upto 30 Rattans. More provisions were framed to give participation to Indians as assessors and jurors in the criminal trials.

B. Civil Administration of Justice

(i) Status of the Munsifs and Sadar Ameens improved

The number of Munsifs and Sadar Ameens was increased. By regulation V of 1831 the jurisdiction of

the Munshifs was increased upto Rs. 300. Regular monthly salary was provided in place of old system of commission.

The jurisdiction of the Sadar Ameen was also increased upto Rs. 1,000 in cases referred to him by the District Diwani Adalat. Furthermore, in 1832 the Sadar Ameen was empowered to execute their decrees and orders.

(ii) Creation of the Court of Principal Sadar Ameen

The Principal Sadar Ameen an Indian officer was appointed by the Governor General in Council. His jurisdiction was raised from Rs. 1,000 to Rs. 5,000 in civil cases referred by the District Diwani Adalat. The Principal Sadar Ameen could hear appeals also against the decisions of the Munsifs and Sadar Ameens provided such appeals were referred by the Diwani Adalat after obtaining permission of the Sadar Diwani Adalat. The existing provision of appeals to the Sadar Ameen against the decision of Munsif was abolished. Appeals against the decision of Principal Sadar Ameen could go to Diwani Adalat and further appeal could go to Sadar Diwani Adalat in some special cases only.

(iii) Registrar's judicial powers abolished

The Registrar was divested with all judicial powers which were exercised hereto and the same were transferred to Sadar Ameen and Principal Sadar Ameen.

(iv) Abolition of the Provincial Court of Appeals

By Regulation V of 1831 the Governor General in Council was empowered to abolish the Provincial Court of Appeal working in any District as it felt necessary

and all the jurisdiction of this court could be given to Diwani Adalat. Rest of the Provincial Court of Appeal were continued to work. The Diwani Adalat were permitted to entertain cases of any amount. By Regulation 11 of 1833 the Governor General in Council was empowered to abolish all the Provincial Court of appeal excepting none, hence the same were abolished in that year. Their jurisdiction was given to Diwani Adalats with the provision of appointing Additional District Judge if deemed necessary to help the court in speedy disposal.

(v) Introduction of Jury System in Judicial System

Regulation VI of 1832 empowered the Governor General in Council to authorise the judge of Diwani Adalat to receive the help of jury while dealing civil cases. The types of jury were, first, a reference of the case to certain prominent members of the locality who were to give their report after due enquiry into it. Second, two persons as assessors were to hear evidence with the judge and to give their separate reports about the questions of facts. Third, certain prominent persons as jurors were selected to help the judge during proceedings and in deciding the case. In this way English Judges got the help of natives in deciding the case in terms of justice. Undoubtedly, the Indians also got the opportunity to share the judicial functions by way of jury.

C. Revenue Administration of Justice

Drastic change was effected by empowering the Collector with vast judicial powers. By Regulation VIII of

1831 the Collectors were conferred the judicial powers erstwhile exercised by the Diwani Adalat to entertain and try summarily all claims relating to arrears of rent or their exactions (i.e revenue matters). He was also empowered to execute all the decrees and orders passed by him. Now the Diwani Adalat, Principal Sadar Ameen, Sadar Ameen and Munsif had only revising powers according to their respective pecuniary jurisdiction against the decision of the Collector. It was considered a retrograde step because till now the Collector was concerned mainly with collection of land revenue only under the scheme of Lord Cornwallis but Lord Bentinck has vested this executive officer with judicial powers of Diwani Adalat in respect of revenue matters.

Appraisal draws the attention that Lord Bentinck no doubt reformed the administration of justice basically. Indians were given more participation in the civil, criminal administration of justice. Arrears of work was reduced. But disparity remained between Indian and English Judges. Indian Judges could deal petty criminal cases only. In civil side, Indian Judges could decide the case with highest monetary jurisdiction of Rs. 5,000. Moreover, the Court of Principal Sadar Ameen with Indian Judge was having jurisdiction maximum of Rs. 5,000 in those cases which were referred by the Diwani Adalat. Other courts with Indian Judges were Sadar Ameens, Munsifs which were having little pecuniary jurisdiction. Another discrimination was that the Americans and British were excluded from the jurisdiction of the courts of Indian Judges. No decision was final which pronounced by the Indian judge rather appealable to the court of English Judge.

JUDICIAL REFORMS AFTER LORD BENTINCK

After Lord William Bentinck, minor reforms were taken place till the establishment of High Courts in 1861.

Civil Matters

Due to strong support given by Lord Macaulay (the Law Member), the Indian Legislative Council passed an Act of 1837 which empowered the unlimited monetary jurisdiction to the Principal Sadar Ameen in cases referred to him by the Diwani Adalat. An appeal could go against the decision of Principal Sadar Ameen to Diwani Adalat in cases upto the value of Rs. 5,000. In the cases exceeding Rs. 5,000 an appeal could go from the court of Principal Sadar Ameen to Sadar Diwani Adalat.

Criminal Matters

Because the Collector was exercising the powers of revenue collection and magisterial powers, he remained overburdened. The Governor General Aukland in 1837 succeeded in getting permission from the directors of the Company to relieved the Collector from magisterial functions. A separate office of Magistrate was started presided over by a person other than Collector. But in 1859 again both the offices were united and given in the hands of Collector. In 1843 Indians were appointed as Deputy Collectors having magisterial powers alongwith revenue powers.

Revenue Matters

Act of 1859 authorised the Collector to try all types of revenue cases. But in 1869 this jurisdiction of the Collector was again transferred to civil courts.

CHAPTER – XI

RACIAL DISCRIMINATION IN THE JUDICIAL SYSTEM

Introduction

During Muslim rule, two systems of law were prevailing i.e. Hindu Law for Hindus and Muslim Law for Muslims. After an entry of East India Company in India, the Britishers entered into a treaty with the Moghul Emperor in 1618 to the effect that they would be governed by their own laws in their settlement areas in different parts of the country. Gradually, this immunity turned into privilege of the Britishers being ruler at that time. Not only the laws, the Britishers got the privilege of being amenable to the jurisdiction of some special courts in both civil and criminal matters. Hence they were not subjected to the native laws and native courts as an ordinary Indian. Under the Regulating Act 1773, the Britishers even though residing in the mofussil area were to be subject to the Supreme Court of Judicature at Calcutta. In Madras and Bombay also, they were subject to His Majesty's courts at the Presidencies.

Here we will discuss the racial discrimination in the judicial administration during East India Company's and British rule in civil and criminal matters. In other words, how far the Indians were discriminated in comparison with Britishers while application of various laws i.e. Hindu laws, Muslim laws, English laws; jurisdiction of various courts and presiding right of various courts i.e. to be (Presiding officer of the Court)

In Civil Matters

Position of judicial administration in the beginning was that all natives under Company's territory were amenable to the jurisdiction of Company's Court whereas the British born subjects were amenable to the jurisdiction of the Crown's courts.

It was provided in 1787 in Bengal that British subject could file a suit in a Company's court which had jurisdiction over native defendant but had no jurisdiction over a British subject provided the British subject had to written a bond to be bound by the decision of such court.

But in 1793, in the plan of Lord Cornwallis it was provided that British subjects residing beyond ten miles of Calcutta were prohibited to the jurisdiction of mofussil civil courts unless they executed a bond to be bound by the decision of such courts in the matters upto the value of Rs. 500/- . Here protection was for Britishers on defendant side. In matters, exceeding Rs. 500/-, they were subject only to the jurisdiction of the Supreme Court at Calcutta. Later on these provisions were also followed in Bombay and Madras in 1799 and 1802 respectively.

A significant change effected by the Charter Act of 1813. It provided that the British subjects residing, trading, or holding immovable property beyond ten miles from the Presidency limits could be sued in the Company's civil courts of the place but still with a benefit that the appeal against such decision could be filed only in the Crown's Court and not in the Sadar Diwani Adalats. Here protection was given to the Britishers as a party in defendant side.

In reforms of 1814 by Lord Hastings it was provided that matters in which either British subject or European or

American was a party, could not be amenable to the jurisdiction of Munsif's court or Sadar Ameen's Court rather the matter could be heard only by the District Court which was usually presided over by an English Judge. But the position was changed, due to petition by certain British subjects in 1827 resulting into amendment of the provisions of 1814 authorising the Sadar Ameen's court to take cognisance of such cases. But in 1831 again Lord William Bentink reversed the existing position by prohibiting the jurisdiction of such court being presided over by the Indian Judges.

The Charter Act 1833 came into existence, it made no reservations in favour of British subjects so far as civil matters were concerned. Moreover, at that time, Lord Macaulay (i.e. the first law member of the Government) was not in favour of any privileges to Britishers in the administration of justice rather he opposed the provisions of the Act of 1813 which contained privilege to British subject to take an appeal to the Crown's courts against the decision of the Company's courts.

The Legislative Council of India passed an Act of 1836 keeping in mind the policy of the Act of 1833 and opinion of Lord Macaulay. Section 107 of the Act of 1836 abolished the privilege of British subjects enjoyed under the Act of 1813. The Act of 1836 extended the jurisdiction of all civil courts, except that of the Munsiffs in Bengal and of Sadar Ameens and district Munsiffs in Madras, to all persons without any discrimination on the ground of birth or descent. The Act was criticised by many British subjects because it abolished the privilege. Later on, by an Act of 1839 the Munsiffs were allowed jurisdiction over all persons but only in cases relating to arrears of rent or exactions of rent.

Incompetence of Munsiff's and Sadar Ameen's Courts in Bengal, District Munsiff's Courts in Madras against British subjects in civil matters was removed in 1843 and 1850 respectively. Hence in civil matters the racial discrimination came to an end in 1850.

In Criminal Matters

As regards criminal justice, racial discrimination existed throughout the British Rule, which came to an end after independence of the country.

During East India Company's rule, Englishmen continued to enjoy a privileged position of being exempt from the jurisdiction of the Company's courts.

The Regulating Act 1773 put the British subjects in Bengal, Bihar and Orissa under the criminal jurisdiction of the Supreme Court at Calcutta. These subjects were exempt from the jurisdiction of the Company's criminal courts in the mofussil.

In 1790, Lord Cornwallis empowered the Magistrates in the mofussil to refer the cases of British subjects before the Supreme Court for trial if such Magistrate found any prima facie case against them after holding an enquiry. Same position was existing in Bombay and Madras.

According to an Act of 1793 passed by British Parliament, the Governor General in Council was authorised to appoint Justice of the Peace who could apprehend, record evidence against British subjects and ultimately commit such cases to the Supreme Court at Calcutta for trial. In 1796 by Regulation II, all Magistrates were also appointed Justices of Peace therefore, they also started to enjoy same powers. Same policy was implemented in Bombay and Madras in 1807.

The Charter Act, 1813 empowered the Magistrates of the Districts to act as Justices of Peace, accordingly empowered to punish British accuseds in cases of assault, forcible entry, or other injury accompanied with force in terms of fine not exceeding Rs. 5000/-. In case of failing to pay the above fine, to award imprisonment of two months. Aggrieved with such punishments, could go to the court of Oyer and Terminer and Goal Delivery by a writ of Certiorari for removal of such convictions.

Section 46 of the Charter Act of 1833 provided that without previous sanction of the Directors, the Government of India could not enact a law which can authorise any court other than the Supreme Court to award death sentence to British subjects

In 1841, the Directors criticised the disparity, moreover, in 1843 the first Law Commission also in its report suggested to end the disparity. Ultimately the Indian Legislative Council enacted Act IV of 1843, which abolished the existing privilege against the decision passed by Justices of Peace in mofussil. This position continued even after the establishment of the High Courts in 1865.

In 1849, law member Mr. Bethune drafted a bill for removing the exemption enjoyed by the British subjects from the Company's criminal courts rather the bill suggested jurisdiction of the Company's courts to all British subjects except in cases of death penalty. The bill was opposed and rejected on the ground that the Company's courts administered Muslim Law and that it would be unfair to subject the British subjects to a foreign system of criminal law.

In 1872 the revised Criminal Procedure Code enacted which provided that only the court presided over by the British

judges could try the British accuseds in minor offences punishable with one year's imprisonment or fine or both. In case of more serious offences, only the High Courts were authorised to try the cases involving British subjects. This sense of disparity or discrimination felt as obnoxious to the Indian sentiments.

Lord Ripon, the Governor-General also submitted proposals to eradicate the disparity but he failed due to severe opposition by British community.

In 1884, according to the provisions of Ilbert Act mixed jury was required of Indians and (Europeans or Americans) for the trial of British subjects.

By the Criminal Procedure (Amendment) Act all persons were subjected to the jurisdiction of the same courts. But disparity continued up to the little extent that it provided the right of the British subjects to be tried by a jury composed of majority of Europeans or Americans. Yet parallel to this provision, Indians were also given right to claim a jury consisting of a majority of Indians.

With the independence of India, the last vestige of racial discrimination or disparity in criminal cases was abolished by the Criminal Law (Removal of Racial Discrimination) Act, 1949 passed by the Indian Parliament.

CHAPTER – XII

THE HIGH COURTS

Introduction

The year 1861 is a conspicuous landmark in the process of development of the legal institutions in India. Hitherto, there existed two parallel judicial systems in the provinces of Bengal, Bombay and Madras. One set of courts, being the crown's courts, consisted of the Supreme Courts of judicature which functioned in the Presidency towns, the other set of courts being the Company's Courts namely Sadar Courts viz., Sadar Diwani Adalat and Sadar Nizamat Adalat at the apex, functioned in the provinces beyond the presidency towns. It was during that year that steps were taken to establish High Courts in the three Presidency Towns of Calcutta, Madras and Bombay. In the context of changed circumstances after 1858, the distinction between the Crown's Courts and the Company's courts had lost all its validity. The year 1861, therefore witnessed the merger of two sets of Courts and the consequent emergence of three High Courts in the three provinces.

In 1780 Chief Justice of Supreme Court of Calcutta namely Sir Elijah Impey was given the additional charge of sole judge of the Sadar Diwani Adalat by Waren Hastings. The Scheme was criticised and ultimately became the reason of dismissal of Elijah Impey. But in 1861 the idea of Warren Hastings achieved success.

A. Reasons for Enacting the Indian High Courts Act 1861

1. Concurrent Jurisdiction

In some cases both Supreme Court and Sadar Diwani Adalat had concurrent jurisdiction. The use of the rule "Constructive Inhabitancy by Supreme Court became the cause of concurrent jurisdiction and created conflicts.

Lord William Bentink Opined

> "The existence of concurrent jurisdictions an anomaly which was productive of very considerable inconvenience, as there had been cases in which opposite decisions had been come to by the Sadar Adalat and the Supreme Court on the same rights supported by the same evidence."

2. No Uniformity regarding law and procedure

There was no certainty of law and procedure in Supreme Court itself and there was also no certainty of law and procedure in the moffusil courts including Sadar Diwani Adalat and Sadar Nizamat Adalat.

H.H. Dowell stated–

> "No one could then pronounce an opinion or from a judgement, however, sound, upon any disputed right, regarding which doubts and confusion might not be raised by those who may choose to call it in question."

In 1829 Sir Charles E. Grey (Chief Justice of Supreme Court at Calcutta) observed –

> "There is an utter want of connection between the Supreme Court and the Presidency Courts, and the two sorts of legal process which are employed by them. The exercise of the powers of the one system is viewed with jealously by those who are connected with the other."

3. Establishment of Central Legislative Authority in 1833

Before the actual work of unifying the two parallel judicial systems could be undertaken it was imperative to adopt some preliminary steps in order to bridge the wide gulf existing

between them. The first important step in this direction was taken in 1833, when the Charter Act established one Central Legislative Authority in India enjoying very wide powers of legislation. Its authority was to prevail throughout India. Its laws were to be binding on every court of justice whether established by the Charter of the Crown or by the authority of the Company. With this the relationship between the Supreme Courts and the Indian Legislature underwent a fundamental change. Previously, they were bound by only those laws of the Indian legislatures which had been registered with them. After 1833, the Supreme Courts lost their privileged position in this respect. They were henceforth to be bound by every Act of the Indian Legislature along with other courts in the country. The year 1833 also initiated the process of codification of the Indian Laws. Second Law Commission was appointed in 1853. The first task assigned by the Secretary of State was to formulate a scheme of amalgamation of the Sadar and Supreme Courts. The Commission in its first report prepared a scheme of amalgamation of the Supreme Court and Sadar Adalat at Calcutta. Fourth report suggested the same plan for Bombay and Madras. In 1859 the first Civil Procedure Code was enacted. Shortly afterwards, the Indian Penal Code and the Code of Criminal Procedure were enacted by the Indian Legislature in 1860 and 1861. Following the disastrous events in 1857, the East India Company was dissolved. The Government of the Country was directly assumed by the Crown in 1858. Now the distinction between the Crown's Courts and the Company's courts had lost all its validity.

Ultimately, in 1861 the British Parliament enacted the Indian High Courts Act which merged the Supreme Courts in the Presidency Towns with the Sadar Courts and created in

their stead new courts which were called the High Courts of Judicature.

B. The Indian High Courts Act, 1861

The Indian High Courts Act, passed on 6th August, 1861, was entitled as 'An Act for establishing High Courts of judicature in India.' It was a small peace of legislation consisting of 19 sections in all.

Section 1 vested in Her Majesty authority to issue Letters Patent creating High Courts of Judicature at Fort William, Madras and Bombay.

Each of these High Courts was to consist of a Chief Justice a Barrister and Puisne judges, not exceeding fifteen in number at a time. At least one third of these judges, including the Chief Justice, were to be barrister of not less than five years standing. Not less than one third of the judges had to be from amongst those members of the covenanted civil service of not less than ten year's standing who had served as Zilla Judges for at least three years. The remaining quota of judges could be selected out of the following categories of persons :–

(i) Barrister of at least five years standing.

(ii) Civil servants of at least ten years standing who had discharged the duty of District Judges for three years to their credit.

(iii) Judges who had been holding the office of Principal Sadar Ameens or Judges of Small causes courts for at least five years.

(iv) Pleaders of the Sadar Courts or the High Courts of at least ten years standing.

The Judges of the High Court were to hold office during His Majest's pleasure. With the establishment of the High Courts in Bengal, Madras and Bombay, the

Supreme Courts; the Courts of Sadar Diwani Adalat and the Courts of Sadar Nizamat Adalat were to be abolished.

The 9th section, defined the jurisdiction and the powers of the High Court. It was to have and exercise such civil, criminal, admiralty and vice admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it was established, as Her Majesty might grant and direct by Her Letters Patent. Save as otherwise directed by the Letters Patent, the High Court was also to enjoy and exercise such jurisdiction, power and authority as were being exercised by its predecessors immediately before its creation. The High Court was to have superintendence over all the courts subject to its appellate jurisdiction.

The 16th section of the Act authorised Her Majesty to erect a High Court for such territory as was not included within the local limits of another High Court, if it was deemed necessary. By section 18, the Crown was authorised to transfer any territory from the jurisdiction of one High Court to that of the other and also authorised to alter and determine the territorial limits of the jurisdiction of the several High Courts.

All provisions of the Acts of Parliament or of any orders of Her Majesty in Council or Charter or of any of the Indian Legislature, applicable to the Supreme Courts were to apply to the High Courts as well so far as they were consistent with the provisions of the Indian High Courts Act and the charters issued under it.

The High Court was to have power to call for returns, to transfer any suit or appeal from one court to another and to

make and issue general rules for regulating the practice and proceedings of such courts.

C. Evaluation

The advantages of High Courts were clear. In each Presidency, there was going to be established sole court of appeal instead of three.

The Supreme Court consisted entirely of the English Lawyers as judges. The Sadar Courts consisted entirely of the civil servants who did not have much legal knowledge. The New High Courts were to consist of both these elements.

It was laid down that the Chief Justice should be barrister of at least five years standing. So Civil servants were not eligible for this office.

D. The Charter of the Calcutta High Court 1862

In pursuance of this Act, a Charter creating the High Court at Calcutta was issued on May, 14th 1862. The Charters for the High Courts of Bombay and Madras were issued on June 26, 1862. The Letters Patent (Charters) were found defective in certain respects. On 28th December, 1865, fresh letters patent were issued. Being all the Charters identical, here discussion of only Calcutta High Court is given.

The High Court was to enjoy powers, authority and jurisdiction on the following lines :

1. The High Court was constituted as a Court of Record

2. Civil Jurisdiction

(a) Ordinary Original Civil Jurisdiction

This jurisdiction in effect was on the same line as was exercised by each of the Supreme Court of Judicature within the limits of the Presidency town.

The High Court was to be entitled to try all cases in the exercise of its ordinary original civil jurisdiction except the

cases falling within the cognisance of the Presidency Small Cause Court in which the debt or damage, or value of the property sued did not exceed one hundred rupees in value.

(b) Extra Ordinary Original Civil Jurisdiction

Under this jurisdiction the High Court authorised to remove and to try and determine any suit pending in any court under its superintendence whenever it thought proper to do so, either on the agreement of the parties, or for the purposes of justice.

(c) Appellate Civil Jurisdiction

The High Court was authorised to hear appeals from the Civil Courts subordinate to it. This jurisdiction, it may be noted, had been inherited by the High Court from its predecessor – the Court of Sadar Diwani Adalat.

(d) Law

In the exercise of its Ordinary Original civil jurisdiction, the High Court was directed+ to apply the same law or equity as would have been applied by the Supreme Court of Judicature. In the exercise of its extra-ordinary original civil jurisdiction, the High Court was directed to apply such law, equity and good conscience as the local lower court having jurisdiction in such a case would have applied. In the exercise of its appellate jurisdiction, the High Court was directed to apply such law, equity and good conscience as the court in which the proceedings in the case were originally instituted ought to have applied.

3. Court for infants, idiots etc.

The High Court was also to exercise the same power and authority with respect to the persons and estates of infants, idiots and lunatics as was being exercised by its predecessor, the Supreme Court.

4. Court for insolvent debtors

One of the Judges of the High Court was authorised to hold the court for the relief of insolvent debtors and could exercise such powers and authorities with respect to original and appellate jurisdiction as are constituted by the laws relating to insolvent debtors in India.

5. Criminal Jurisdiction

(a) Ordinary Original Criminal Jurisdiction –

This jurisdiction was to extend within the same local limits as the Ordinary Original civil jurisdiction. Beyond these limits it extend to all such persons e.g. British Subject's as the Supreme Court of Judicature enjoyed formerly.

(b) Extra Ordinary Original Criminal Jurisdiction –

The High Court was to enjoy this jurisdiction over all persons residing within the jurisdiction of any court subject to the superintendence of the High Court. The High Court could try any person on charges being prepared by the Advocate General, or by any magistrate or any officer specially empowered by the Government in that behalf.

(c) Appellate Jurisdiction

The High Court was to be a Court of Appeal from subordinate criminal courts. The High Court was also to act as a court of Reference and Revision from the subordinate Criminal Courts. It might hear and determine all reference made to it by the Sessions Judges. It might revise proceedings of the lower Criminal Courts.

(d) Law

In the discharge of its criminal jurisdiction the High Court was to apply the law as contained in the Penal Code which had already been enacted by the Indian Legislature.

6. Admiralty and Vice Admiralty Jurisdiction

The High Court was to enjoy all civil, criminal and maritime jurisdiction and also jurisdiction to try and adjudicate prize causes and other maritime questions arising in India to the same extent as was being exercised by the late Supreme Court of Judicature as a Court of Admiralty and Vice Admiralty.

7. Testamentary Jurisdiction

The High Court was to have this jurisdiction to the same extent as was being enjoyed by the Supreme Court. It could grant probate of wills and letters of administration.

8. Matrimonial Jurisdiction

The High Court's matrimonial jurisdiction was to extend only to those subjects of the Crown who professed the Christian Religion. It was not to interfere with the exercise of any jurisdiction in matters matrimonial dealt by any other court. This saving provision was meant to protect the jurisdiction being exercised by the Company's Courts in matrimonial matters between Armenians or Native Christians.

9. Procedure in Civil Jurisdiction

As regards procedure in the exercise of original, extra-original, appellate civil jurisdiction code of civil procedure was applied.

10. Procedure in Criminal Jurisdiction

In exercising ordinary original jurisdiction, English Criminal Procedure Code was to apply. In extraordinary and appellate jurisdiction, code of criminal procedure was to apply.

11. Appeal to the Privy Council in Civil Cases

The Charter made provisions for regulating Appeals to the Privy Council. An Appeal could be made to the Privy Council, in any case not being of criminal jurisdiction from any

final judgement, decree or order of the High Court, if either the value of the subject matter was not less than Rs. 10,000, or the High Court declared that "The case was a fit one for appeal" to the King in Council.

The High Court in its discretion could grant permission to appeal to the Privy Council from any preliminary or interlocutory judgement, decree or order or sentence in any proceeding not being of a criminal nature.

12. Appeal to Privy Council in Criminal Cases

In criminal cases, appeal could lie to the Privy Council from any judgement, or sentence by High Court made in exercise of its original jurisdiction or in any case where a point of law had been reserved for the opinion of the High Court by another court of original jurisdiction. In such cases, appeal lay when the High Court declared that the case was a fit one for appeal.

13. Subject to Legislative Power

It was declared that the provisions of the Letters Patent were subject to the legislative powers of the Indian Legislature and 'may be in all respects amend and alter thereby.

E. Evaluation

For over eighty years, there had been in existence two parallel systems of judicature in the Presidencies. They represented two different sources of power. The duality of control over the judicature was also done away with the High Court which derived authority from one source i.e. Parliament and the Crown, and not from any government in India.

It was hoped that the High Court would combine the legal knowledge of the Supreme Court Judges and the intimate knowledge of the language, customs and habits of the Indian people possessed by the Judges of the Sadar Adalats.

In the area of civil law, while exercising ordinary original civil jurisdiction, English Civil Laws were applied. While exercising extra ordinary and appellate civil jurisdiction, existing laws, equity, good conscience were to apply.

In the area of criminal law, Penal Code was applied while exercising ordinary original criminal jurisdiction, extra ordinary and appellate jurisdiction.

In the area of civil Procedure while exercising civil jurisdiction in ordinary original civil jurisdiction, extraordinary civil jurisdiction, appellate jurisdiction, code of civil procedure was applied.

In the area of criminal procedure while exercising ordinary original criminal jurisdiction, English criminal procedure and while exercising extra ordinary criminal jurisdiction and appellate jurisdiction, code of criminal procedure was to apply.

The Supreme Court was precluded from exercising any jurisdiction in any revenue matters. But the High Court was authorised such jurisdiction also.

A careful perusal of the above mentioned summary of the provisions of the charter would indicate that as regards the ordinary original side of the High Court it was the immediate successor of the Supreme Court of Judicature; the appellate side, of the Sadar Adalats. Even the High Court enjoyed more jurisdiction than the Supreme Court. By Act of 1781 the Supreme Court was precluded from exercising any jurisdiction in any revenue matters (revenue oppressions). But the High Court was not placed under such restriction.

OTHER HIGH COURTS

F. The Allahabad High Court

Section 16 of the High Court Act, 1861 had authorised the Crown to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within local jurisdiction of another High Court.

A charter was issued on 17th March, 1866, establishing a High Court at Agra for the North Western Provinces. The High Court was shifted to Allahabad in 1875 and then it came to be known as the High Court of Judicature at Allahabad. The constitution, jurisdiction, powers and privileges of the Allahabad High Court were much similar to those of the Presidency High Courts except for the following points of difference :–

1. The High Court at Allahabad did not enjoy any 'ordinary original civil jurisdiction'. It had only extraordinary original and appellate civil jurisdiction.
2. The High Court at Allahabad did not enjoy any Admiralty or Vice Admiralty jurisdiction.

On July 26, 1948 the territorial jurisdiction of the High Court was augmented by the amalgamation of the Oudh Chief court with it.

G. The Indian High Courts Act 1911

The Act of 1861 had fixed the maximum number of judges, excluding the Chief Justice at fifteen. The Act of 1911 raised this limit, including the Chief Justice to twenty.

Secondly, Act of 1911 made provisions for appointment by Governor General in Council of additional Judges to a High Court for a maximum period of two years.

Thirdly, the salaries of judges or temporary judges were to be paid out of the revenues of India.

H. The Government of India Act, 1915

A few provisions of the Regulating Act, 1773 and the Act of Settlement, 1781, were re enacted by the Act of 1915. The Act of 1915, however, made one significant change with respect to the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay, that it laid down that these courts "May not exercise any original jurisdiction in any matter concerning revenue according to the usage and practice of the country or the law for the time being in force.

Secondly, the Governor General, Governor, Lieutenant-Governor, Chief Commissioner, members of the Executive Council of the above officials, ministers were to be exempted from the original jurisdiction of the High Courts for anything counselled, ordered or done by any of them in their public capacity. None of these officials was to be liable to be arrested or imprisoned in any suit or proceeding in any High Court on its original side or was to be subject to the original criminal jurisdiction of a High Court in respect of any offence not being treason and felony. The exemption from liability of arrest and imprisonment was also extended to the Chief Justice and other judges of the High Courts.

I. The Patna High Court

In 1912, the territories of Bihar and Orissa, which had previously formed part of the Province of Bengal, were constituted into a distinct province. On 9th Feb., 1916 Letters Patent establishing a High Court in the new province was issued and thus the High Court of Judicature at Patna came into existence.

The Patna High Court was to have the same admiralty Jurisdiction as was exercised by the High Court of Fort William.

J. The Lahore High Court

The Lahore High Court came into existence by virtue of the Letters Patent issued on 21st March, 1919. It was to have jurisdiction over the Provinces of Punjab and Delhi. At the time of the issue of this Letters Patent there existed the Chief Court of Punjab which was established by an Act No. XXIII of 1865 of the Indian Legislature. In all material respects, the High Court at Lahore corresponded to that at Allahabad.

K. High Courts under the Government of India Act, 1935

In 1935, the British Parliament enacted the Government of India Act, 1935 which remodelled the constitution of the whole country on federal lines. Certain provisions were made to regulate the composition and constitution of the High Courts, the position under the Act was as follows:

From the very beginning, the Judges of the Supreme Courts and then the Judges of the High Courts used to hold office during His Majesty's pleasure. This provision was expressly laid down in the Indian High Courts Act of 1861. It was repeated in the Government of India Act, 1915.

The Government of India Act, 1935 effected a change in this respect. It was thus laid down that a judge of the High Court would hold office up to the age of sixty years. He, however, could be removed earlier by His Majesty on the ground of misbehaviour or infirmity of mind or body, if the Judicial Committee of the Privy Council, on a reference being made to it by His Majesty, reported that the Judge ought to be

removed on any such ground. The Judges of the High Court thus got a security of tenure.

Since their inception, the High Courts in India had to contain one third of the Barrister Judges and one third of the Civil Service Judges. This rule was specified in the Indian High Courts Act, 1861 as also in the Government of India Act, 1915. The rule was found to be inconvenient and so the Government of India Act, 1935 dropped the rule fixing the percentage of the various categories of Judges. The appointing authority could now select a suitable person from any of the qualified categories of persons for appointment as a High Court Judge as and when occasion arose. The Act of 1935 introduced the rule that Barrister and Advocates of ten year's standing were to be qualified for appointment as the High Court Judges. Here qualified categories means, categories prescribed by the Act of 1861.

3. The Indian High Courts Act 1861, had laid down that the Chief Judge of the High Court should always be a Barrister. After 1915, the Chief Justice had to be a Barrister or an Advocate. No civil service judge could ever be the Chief Justice of a High Court. This was regarded as an anomaly and so the Government of India Act, 1935 dropped this provision. Thereafter, members of the civil service also became legible for the office of the Chief Justice.

4. To settle the quarrels between the Supreme Court at Calcutta, on the one hand, and the Government and the Company's Courts, on the other all revenue matters were excluded from the purview of the Supreme Court by the Act of Settlement of 1781. Such a restriction was omitted from the High Courts Act of 1861. But, curiously enough, the Government of India Act 1915, for no apparent reasons, re-

imposed the same old restriction on the jurisdiction of the Calcutta, Madras and Bombay High Courts. Though these High Courts might adjudicate a matter relating to revenue of their appellate side, they could not do so on their original side. This was an absurd anachronism.

The Government of India Act, 1935 however again, failed to remove this anachronism.

The High Courts were placed by the Act of 1935 under the administrative control of the Provincial Governments but adequate care was taken to safeguard their independence. The Government of India Act, 1935 thus laid down that the expenses of High Court would be charged from the revenue of the Province. The Governor was to exercise his individual judgement in assessing the expenditure of the High Court and the provincial legislature was not authorised to reduce or curtail the expenses of the High Court.

The Act of 1935 provided that the salaries, allowances, and pensions of the High Courts Judges would be fixed by His Majesty in Council, upon their appointment and these could not be varied to the disadvantage of a Judge after his appointment.

6. The Act further laid down that no discussion could take place in the legislature with respect to the conduct of a High Court Judge in the discharge of his duties.

7. In order to safeguard the High Courts from any law, prejudicing or affecting their status, instructions were issued to the Governor-General and Governors to reserve for his Majesty's assent any Bill which in their opinion, would so derogate the powers of the High Courts as to endanger the position. It would be correct to say that the High Courts were neither fuily federalised nor fully provincialised.

L. More High Courts Created

Nagpur

The 'Court of the Judicial Comissioner', was created by an Act of the Governor-General in Council , Act XIV of 1865. The High Court at Nagpur was abolished by the Letters Patent issued by George V on 2nd January, 1936. The jurisdiction, powers and privileges of this High Court were on the same lines as those of the High Court at Allahabad.

Punjab

As a result of the partition of India into India and Pakistan in 1947, the Lahore High Court was lost to India. To meet the needs of the newly created East Punjab Province, a new High Court was erected through the High Court (Punjab) Order, 1947 issued by the Government of India. The New High Court was to enjoy the same power and jurisdiction as had been enjoyed by the erstwhile Lahore High Court. In 1966, the High Court was designated as the High Court of Punjab and Haryana.

Assam and Orissa

The territory of Assam had been subject to jurisdiction of the Calcutta High Court. Through the Assam High Court order 1948, issued by the Government of India, the High Court was erected there.

Orissa had been subject to the jurisdiction of the Patna High Court before 1948. A separate High Court was erected for Orissa under the Orissa High Court order, 1948.

The High Courts of Assam and Orissa were given the same jurisdiction as had been exercised previously by the Calcutta and the Patna High Courts respectively.

High Courts under the New Constitution

The Constitution of the Republic of India makes a number of provisions in relation to the High Courts in the country. Chapter V of part VI of the Constitution contains the relevant provisions which are discussed in the chapter : Court System under the Constitution of India in this book. The Constitution of India, 1950 provides High Court for each state.

Court of Record – Each High Court is to be a court of record having the power to punish for contempt of itself.

Appointment – The judges of a High Court are appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned and the Chief Justice of the High Court to which the appointment is to be made.

CHAPTER – XIII

APPEALS TO THE PRIVY COUNCIL, FEDERAL COURT AND SUPREME COURT

Introduction

A. REASONS OF THE PRIVY COUNCIL'S JURISDICTION

The King was regarded under His prerogative power as the 'Fountain of Justice' throughout his dominions and exercised jurisdiction in his Council which acted in an advisory capacity to the Crown. Hence the body was called King in Council or more specifically the Privy Council.

The King in Parliament, which came to mean the 'House of Lords', became the final Court of Appeal in relation to the Courts of England.

The Privy Council - or as it later came to be known the Judicial Committee of the Privy Council as it came to be called officially, after 1833 acted as the highest Court of Appeal from the Courts in India for a very long time. In the case of *Fryer* v. *Bernard* it was held that "Appeals from overseas dominions could lie only to the King in Council."

The practice of invoking the exercise of the Royal Prerogative by way of appeal from any Court in His Majesty's Dominions, in its origin, depended on a mere petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of justice and law. To begin with, petition to the King in Council, was taken into consideration only as a matter of grace. It was within discretion of the King in Council to grant or refuse to leave to appeal.

With the settlement of Canada and the creation of the Indian Empire, however, it usually became the practice to make provisions allowing appeals to the King in Council under

certain circumstances from the Courts there. The former petitory appeal thus ripened into a privilege for the King's subjects. Appeals made under these provisions came to be designed as "Appeals as of Right".

Appeals could still be brought before the King's Council with special permission, even though they did not fulfil the provisions expressly made in that behalf. These Appeals came to be designated as "Appeals by special leave."

B. RIGHT OF APPEAL FROM INDIA

I. Appeals from the Crown's Courts

1. Mayor's Court : In 1726, for the first time a right to appeal to the King in Council was granted, from the Courts in India. In 1726, the Judicial Charter issued then to the Company by George I to establish three Mayor's Courts, in the three Presidency towns of Calcutta, Bombay and Madras also granted a right of appeal to the King in Council from the judgements of these courts. Appeals from the Mayor's Court, in the first instance, lay to the Governor and Council of the Presidency. The decisions of the Governor and Council were to be final in all those cases where the value of the subject matter involved did not exceed 1000 pagodas. In all other cases, a further appeal from the Governor and Council to the King in Council was allowed within 14 days of its decision.

2. Supreme Court at Calcutta

(i) Civil Matters : The Mayor's Court at Calcutta gave place to the Supreme Court of Judicature in 1774. The Regulating Act reserved a right of appeal to His Majesty in Council from the Judgements of the Supreme Court. The Supreme Court was directed not to allow any such appeal unless the petition for that purpose was preferred before it within six months from the day of pronouncing the Judgement and unless the value of

the subject matter in dispute 'shall exceed the sum of one thousand pagodas'.

(ii) Criminal Matters : By 32nd clause of the Charter, the Supreme Court was to have full and absolute power and authority to allow or deny appeal in all matters of Criminal causes whatsoever, and to regulate the terms, upon which such appeals shall be allowed in such cases in which the said Supreme Court of Judicature at Fort William in Bengal, may think fit to allow such appeals.

Apart from these provisions, the King in Council reserved to himself, full power and authority, "upon the humble petition of any person aggrieved by a judgement etc. of the Supreme Court, to refuse or admit his or her appeal coming therefrom.

3. Recorder's Courts at Madras and Bombay

The Mayor's Courts at Madras and Bombay gave place to the Recorder's Courts in 1797. Provisions analogous to those prevailing at Calcutta were made for regulating appeals from the Recorder's Court to the King in Council.

4. Supreme Court at Madras

In 1800, the Recorder's Court at Madras gave place to the Supreme Court. The Charter of the Court provided for a right of appeal to the King in Council. The Provisions regulating such appeals were similar to those contained in the Charter of the Supreme Court at Fort William. An appeal could be allowed only when the value of the subject matter exceeded 1000 pagodas.

5. Supreme Court at Bombay

The Recorder's Court at Bombay gave place to the Supreme Court in 1823. The Charter of that Court again provided for a right of appeal to the King in Council. Bombay

Supreme Court had jurisdiction to try the suit upto 3000 Bombay rupees and it had been a final decision. Above to this amount the appeal was allowed to King in Council.

II. Appeals From the Company's Courts (Sadar Diwani Adalats)

1. Sadar Diwani Adalat at Calcutta

Apart from the Supreme Court, there used to be the Sadar Diwani Adalat in Bengal. As Company's' Court, it used to hear appeals in civil causes from the Company's Courts in the mofussil of Lengal, Bihar and Orissa. It was composed of the Governor General and members of the Council as Judges. In the beginning, the decisions of this Court were final. In 1781, however, the Act of Settlement enhanced its status by constituting it into a Court of Record to hear and decide all pleas and appeals from the Mofussil Diwani Adalats of the Company. A right of appeal from the decisions of the Sadar Adalat to the sovereign or King in Council was also provided for, in civil suits only, where the value of the subject matter in dispute exceeded £ 5000, within 6 months of the decision but not in Criminal Causes.

The Act of settlement, besides prescribing the monetary limit beyond which appeals from the Court of Sadar Diwani Adalat could go, had not prescribed any further rules to regulate such appeals. Governor General and Council was authorised to formulate such rules for the guidance and information of the parties who might be desirous to file appeal from the decrees of the Sadar Diwani Adalat to the King in Council as also for the guidance of the Sadar Diwani Adalat itself in receiving and forwarding the appeals presented to them under the authority of the Act of 1781. With this in view, the Governor General in Council enacted Regulation 16 of 1797

which lay down certain rules to govern appeals to the Privy Council. The Regulation laid down that appeal was to be presented to the Sadar Diwani Adalat, within six months from the date of the judgement where the value of the subject matter exceeded £ 5000 or above.

2. Sadar Diwani Adalat at Madras

In 1802, the Sadar Diwani Adalat came to be established in Madras also. The Adalat was to consist of the Governor and Council. From its decisions in civil suits of the value of 45000 rupees and upwards an appeal lay to the Governor General in Council at Calcutta. In 1818 the Governor General in Council relinquished the authority to hear appeals from the Sadar Diwani Adalat at Madras. Provisions were then made for the appeals from the Madras Sadar Diwani Adalat to the King in Council, under rules similar to those contained in the Bengal Regulation 16 of 1797. These rules were published by the Madras Regulation 8 of 1818. The one peculiar feature of this Regulation was the absence of any restriction as to the appealable amount.

3. Sadar Diwani Adalat at Bombay

In the case of Bombay the right of appeal was allowed as early in 1812. A Regulation passed in that year enacted the rules for regulating appeals from the Bombay Sadar Diwani Adalat to His Majesty in Council (i.e. King in Council), in suits involving value of £ 5000, exclusive of costs. The Regulation of 1812, however, was modified by Regulation 5 of 1818 of the Bombay Code. Certain rules, similar to those made at Bengal regulating to appeals were enacted. One conspicuous omission in these rules was the absence of any appealable amount for the purpose of appeals to the King in Council. In the year 1827, the new Code of Bombay Regulations, known as the

'Elphinston Code' came into force. The code laid down fresh provisions for appeals from the judgements of the Sadar Diwani Adalat. In the absence of prescribed appealable amount, the result was that a large number of appeals were forwarded involving a trivial amount and this became a source of great inconvenience, grievance and hardship to the respondents.

In all the Presidencies the respective Regulations had reserved the Sovereign's right to reject or receive the appeals, notwithstanding any provisions contained in these Regulations. Hence there were two kinds of appeals from the Courts of Sadar Diwani Adalat in the three Presidencies viz. : Appeals to the Privy Council as a matter of Right when conditions laid down in the Regulations were fulfilled; Appeals to the Privy Council by its Special leave in all other cases.

C. FATE OF EARLY APPEALS

To start with, the Indians could not make much use of the provisions of appeals to the King in Council. They were ignorant of the steps necessary to be taken to bring an appeal before the Privy Council.

I. Appeals from Supreme Courts : In the cases of the Supreme Courts, rules for appeals to His Majesty in Council had been laid down in their Charter of Justice. The Courts themselves had made some additional rules and orders in this behalf.

The suits in Supreme Courts were carried on by the English Counsels and Attorneys. The proceedings and the procedure of these courts resembled those in England. It was thus very easy for a suitor in the Supreme Court to appeal to the King in Council and pursue the appeal in England. An Attorney, who helped him in pursuing his suit at the Supreme

Court in India, would appoint a solicitor in England in case of appeal, but it was very expensive affair.

II. Appeals from Sadar Diwani Adalats :– On the other hand, both the suitors and practitioners in the courts of the company were very little acquainted with the mode and manner and procedure of conducting appeals in England. The suitors in the Company's court were mostly native residents in the interior of the country so had very little intercourse with the Europeans. These persons had no idea of the constitution, law and procedure of the English Courts. With the result that either they shrank from the attempt to go in appeal to His Majesty in Council, or out of total ignorance regarding the requisite steps to be taken to pursue the appeals, failed to put the steps. Morley observed - "With the result, the parties could not profitably or extensively make use of the provision relating to appeals to the Privy Council."

The attorney of the Supreme Court was thus a connecting link between the appellant and the Privy Council. No such connecting link existed in the case of appellants from the Sadar Diwani Adalats. The Vakeels who helped the parties in India were of no further use in case appeals to the king in Council. They did not know the steps that were necessary to be taken.

The transcripts of the unpursued appeals, accumulating in the Privy, Council Office, were sent to the 'East India House', for the purpose of being examined. The Solicitors of the East India Company prepared report, stating the cause of action, the names of the parties, the amount sued for, and all other requisite particulars respecting each appeal. The report was forwarded to the 'Board of Control' for the purpose of being laid before the Privy Council but no action was taken.

On an examinations in 1828, the report revealed that the earliest appeal was from Bengal, from a decision pronounced in the year 1799, by Sadar Diwani Adalat. In all ; twenty one appeals were pending from Bengal, ten from Madras, and seventeen from Bombay. None of the appeals from Bombay and Madras was of an earlier date than the year 1818.

Accordingly, in 1832 the Board of Control requested Sir James Mackintosh, Sir Edward Hyde East and Sir Alexander Johnston to suggest the best course to be adopted in order to cause all the old appeals to be put in train for decision. They were assisted by Richard Clarke, formerly of the Madras Civil Service, who arranged all papers connected with the various appeals. These gentlemen made certain suggestions. The company did not yet move to bring the appeals to hearing. Its chief worry was whether it would be able to recover from the parties concerned the costs which it might have to incur in bringing the appeals to a hearing.

D. REORGANISATION OF THE PRIVY COUNCIL

With the growth of the Empire, the business coming before the Privy Council naturally increased. There were many compiaints of the way the Privy Council conducted its Judicial work. The Privy Council used to do its work by means of a system of committees. One such committee was that for 'trade and foreign plantations'.

It was to this committee that the business of hearing appeals was assigned. The hearings were usually before a sub-committee of five or six persons. The sub committee had no permanent existence but was collected together from time to time to deal with a batch of petitions. Usually the committee consisted of persons who had little acquaintance with the law. If possible, a legal Privy Councillor was put on the committee.

The master of the Rolls used to sat in the committee at the close of the 18th century. Moreover, all the members had other important work to do. They had not time enough to devote to the Judicial work.

According to Keith - "In many cases issues were dealt with, rather from the point of general expediency than of strict law."

In 1828, Lord Brougham had occasion to comment on the state of the hearing of appeals by the Privy Council and on the extent and importance of its jurisdiction in the following words in his famous speech on the 'Law reform in England', -

> "Hardly any two of the colonies can be named which have the same Law ; and in the greater number, the law is wholly unlike our own. In some settlements it is Dutch Law, in others the Spanish, in others the French, in others the Danish. In our Eastern possessions these variations are, if possible, greater ; while one territory is swayed by the Mohammedan Law, another is ruled by Hindu Law ; and this again, in some of our possessions is qualified or superseded by the law of the Budha ; the English Jurisprudence being confined to the handful of British settlers and the inhabitants of the three presidencies".

Lord Brougham thought that the Judges of the Privy Council should be men of the largest legal and general information, accustomed to study other systems of Law besides the English and associated with lawyers who have practised or presided in the colonial courts.

The constitution of the Privy Council, at the time was hardly suited, exercising such a vast and varied jurisdiction. In 1830 Lord Brougham himself became the Lord Chancellor and he decided to introduce a Bill on the subject of the constitution of the Privy Council Accordingly, on 14th August, 1833 Parliament enacted the "Judicial Committee Act". This important Act constituted a committee of the Privy Council to be known as the "Judicial Committee", This committee was to consist of the President of the Privy Council, Lord High Chancellor and other Privy Councilors holding high judicial offices in the country like the Lord Chief Justice or Judge of the Court of King's Bench, Master of Rolls, Vice-chancellor, Chief Justice or Judge of the common Pleas, Chief Baron or Baron of the Court of Exchequer etc.

Under the Act of 1833, the Judicial committee took on the aspect of an ordinary court of justice. The Act contained provisions regulating its procedure, cost of appeals and such other sundry items. The grounds of every decision were to be read in the open court.

Thus the entire appellate jurisdiction of the sovereign in Council was hence forth to be exercised solely by the judicial committee, which was constituted into an efficient instrument to discharge the vast responsibility.

E. INDIAN APPEALS UNDER THE ACT OF 1833

The act of 1833 dealt with the question of the Indian appeals in a specific manner:–

The 22nd section of the Act provided that as various appeals had been admitted by the Courts of Sadar Diwani Adalat at the three presidencies and the transcripts of the proceedings had been from time to time transmitted to the Privy Council Office but the suitors had not taken the

necessary measures to bring on the same to a hearing. His Majesty in Council might direct the East India Company to bring appeals from the Sadar Diwani Adalats of three presidencies for hearing and to appoint 'Agents and counsels' for the different parties in such appeals, and make such orders for the security and payment of costs as His Majesty in Council should think fit.

Section 24 empowered His Majesty in Council to make rules and orders for regulating the mode, form and time of appeal to be made from the decisions of the Sadar Diwani Adalats or from other courts of Judicature in India and for the prevention of delays in making or hearing of such appeals, and as to the expenses and amount of the property.

Section 30 provided that two members of the Privy Council, who should have held the office of the Judge in the East Indies or any of His Majesty's dominions beyond the seas, might attend the sittings of Judicial committee of the Privy Council as Assessors but without votes, at a salary of £ 400 a year.

F. DISPOSAL OF PENDING APPEALS

To provide for the disposal of the appeals from India which were pending before the Privy Council in the absence of any proceedings. Three Orders in Council were made in the year 1833 under the 24th section of the Act of that year :

First Order in Council : The first order in Council dated 4th September 1833, ordered that the East India Company should bring to a hearing before the Judicial Committee of the Privy Council all cases of appeal mentioned in the list appended to the said order. The same being appeals from the courts of Sadar Diwani Adalat in the East Indies, in which no proceedings had been taken in England, on either side, for two

years subsequent to the admission of the said appeals respectively, The list contained eighteen cases from Bengal, ten from Madras and fifteen from Bombay.

Second Order in Council : The Second Order in Council dated the 18th November, gave further direction in pursuance of the Act of 1833. The East India Company was ordered to appoint Agents and Counsels, when necessary for the different parties in appeals to His Majesty in Council, pending and mentioned in the said list to transact and do all things as had been usual for Agents and Counsels for parties in appeals to His Majesty in Council, from the colonies or plantations.

Third Order in Council : The third Order in Council of the same date directed that the Company should be entitled to demand payment of their reasonable costs of bringing appeals to hearing by virtue of the said Act, to such an amount and from such parties and should have such lien for the said costs upon all deposits which might have been made and all securities given in respect of such appeals as the Judicial committee of the Privy Council should direct.

Hitherto appeals to the Judicial committee of the Privy Council could be made from the courts of Sadar Diwani Adalat in cases involving a subject matter valued over £ 5000 and from Supreme Court in cases valued over 1000 pagodas. There was thus a great disparity of circumstances under which appeals from the two sets of courts lay to the Privy Council.

Fourth Order in Council : This anomaly was done away with by an Order in Council dated the 10th April, 1838, enacted in pursuance of the Act of 1833. The order Provided that after the 31st day of December, 1838 no appeals to Her Majesty in Council should be allowed from the Supreme Courts of judicature in India, or from the Courts of Sadar Diwani Adalat,

unless the petition for that purpose was presented within 6 months from the day of the date of Judgement, decree or order complained of and unless the value of the subject matter in dispute in such appeals amounts to 'ten thousand' of the Company's rupees at least.

The Order in Council, further provided that nothing contained therein should extend or in any way be construed to extend, diminish or derogate from, the undoubted power and authority of Her Majesty in Council upon the petition of any party aggrieved by any judgement, decree or decretal order of any of the Courts, to admit an appeal therefrom upon such other terms, and subject to such limitations, as Her Majesty 'shall in any such special case think fit to prescribe'.

G. FURTHER REGULATIONS OF THE PARLIAMENT

In July 1843, the British Parliament passed an Act to make further Regulations for facilitating the hearing of appeals by the Judicial Committee of the Privy Council. This Act provided that appeals might be heard by not less than three members of the Judicial Committee. Thus the quorum of the Committee fixed at four in 1833 was reduced to three in 1843.

The Act of 1845 was passed to amend the previous Act of 1833. It was laid down that the provisions of the Act of 1833 should not be applied to the case of an appeal from the courts of Sadar Diwani Adalats after the first day of January 1846. Such appeals were to be managed by the parties themselves. Uptil now, the East India Company brought such cases to a hearing under the Act of 1833 be appointing Agents and Counsels in England for the purpose. The Act further laid down that appeals from the Courts of Sadar Diwani Adalat filed after the first day of January, 1946 should be considered as abandoned and withdrawn by consent of parties, unless

some proceedings were taken in England by one of the parties with in two years after the registration of the appeal in the Privy Council's Office.

H. HIGH COURTS - APPEALS TO THE PRIVY COUNCIL

In 1861, however a major change in the Judicial institution in India occurred with the creation of the three High Courts in the three Presidencies of Madras, Calcutta and Bombay as a result of the Amalgamation of the Supreme Courts, the Courts of the Sadar Diwani Adalat and Sadar Nizamat Adalat.

In Civil Cases - An appeal might be made to the Privy Council in any matter not being of criminal jurisdiction from any final judgement, decree, or order of the High Court, if either the value of the subject matter was not less than Rs. 10,000 or the High Court declared that 'the case was a fit one for appeal' to the king in Council

In Criminal Cases - In criminal cases appeals could lie to the Privy Council from any Judgement or sentence of a High Court made in exercise of its original jurisdiction. In such cases, appeals lay when the High Court declared that the case was a fit one for appeal.

In course of time many more High Courts were established in India. Appeals to the King in Council from these High Courts lay substantially on the same grounds as mentioned above.

The Civil Procedure Code, enacted subsequently, it also fixed at Rs. 10,000 the appeallable amount in a Civil case. The criminal Procedure Code did not contain any provisions regarding appeals to the Privy Council from the judgements of the High Courts.

The above mentored provisions regulated appeals to the Privy Council from the High Courts 'as of right'. The King in Council could grant a 'special leave to appeal' in Civil are criminal cases not falling within the above provisions.

I. COMPOSITION OF THE PRIVY COUNCIL REFORMED

The constitution of the Judicial Committee of the Privy Council as settled by the Parliament in 1833, underwent certain changes in course of time. The tenor of these changes was twofold :– **Firstly,** the legal element in the Committee was strengthened so much so that after 1876 the 'Lords of Appeal in the ordinary' who used to sit in the House of Lords for hearing appeals from the Courts of England, also formed the nucleus of he Judicial Committee. In a way the composition of the Judicial Committee became identical with that of the House of Lords.

Secondly, the Act of 1833 had provided for the appointment of two retired Indian Judges as Assessors to the Judicial Committee. They were to attend the sittings of the Privy Council but did not have any right to vote. Some appointments were made, under this provision from amongst the retired judges of the Supreme Courts Retired Judges of the Sadar Diwani Adalats in India were not however, appointed to sit as Assessors in Indian appellate cases. This arrangement had some drawbacks i.e. the judges of Sadar Diwani Adalat had the knowledge relating to revenue and the Regulations of the Govt., was not possessed by the Judges of the Supreme Courts. The position improved only in 1908, when by 'The Appellate Jurisdiction Act' it was laid down that if any person being or having been Chief Justice or Judge of any High Court in British India is a member of His Majesty's Privy Council, he shall if His Majesty so directs, be a member of the Judicial

Committee. The number of persons for Judicial Committee by Virtue of this section was not to exceed two at one time. In this way the Judicial Committee came to have persons versed in the Indian Law as its full fledged members.

J. APPEALS BY SPECIAL LEAVE

As noticed above, in many cases appeals to the Privy Council lay only by way of special leave to appeal granted by the Privy Council itself.

In Civil Cases : It was very reluctant to grant special leave to appeal. In civil cases, the Principles on which special leave was allowed were indeterminate. Generally it may be said that special leave to appeal in civil cases was granted only when there was a substantial question of Law involved or when the case had some gravity, involving matter of public interest, or affecting property of considerable amount or where the case otherwise of some public importance or of a very substantial character.

Viscount Haldane in his judicial pronouncement in the famous case of Hull V. Mackenna made a reference to the question as follows :

'.....Unless the case is one, involving some great principle or is of some very wide public interest.'

In Criminal Cases : As the Code of Criminal Procedure made no provisions for appeals from the High Courts to the King in Council, appeals in Criminal cases came before the Judicial Committee of the Privy Council by way of special leave to appeal.

In Dal Singh's case, The Judicial Committee had occasion to observe the circumstances under which it used to advise the King to grant special leave to appeal in criminal cases. "The general principle is established that the sovereign

in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted court of criminal appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred."

In criminal cases the judicial committee, did not grant special leave to appeal generally.

K. SOME PECULIAR FEATURE

A peculiar feature of the Judicial Committee of the Privy Council, which continued to remind the people, of its descent from the King's executive council, was the advisory form in which its decisions were couched. A decision of the Judicial Committee did not assume the form of a final verdict, capable of being executed suo motu rather it used to be in the form of a report tendering advice regarding the action to be taken in the case under appeal. In practice, of course, the appeal was allowed or dismissed in accordance with the advice tendered by the Judicial Committee but strictly speaking, the report of the committee had no legal effect until it was confirmed in ordinary meeting by the Privy Council. The practice has been commented upon by Lord Haldane in *Hull* v. *Mackenna.*

> "We are not ministers in any sense; we are a Committee of Privy Councillors who are acting in the capacity of judges, but the peculiarity of the situation is this : it is a long standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty but in a judicial spirit. We have nothing to do with policies, or party

considerations; we are really judges; but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgement himself and always acts upon the report which we make."

A second feature of the Judicial Committee as a Court was that only one decision was pronounced and no dissenting judgement was delivered. The reason for this practice was that since the Privy Council had the advisory position so it was thought that it would be indecent to give conflicting advice on the same question.

Another feature of the Judicial Committee, which was again reminiscent of its executive lineage, was that it did not deem itself bound by its previous pronouncements.

L. EVALUATION OF THE SYSTEM OF APPEALS TO THE PRIVY COUNCIL

Merits

The Privy Council, a judicial institution, was perhaps unique among the courts of the world. It exercised jurisdiction, to a more or less degree, over many great Dominions, Colonies and plantations. In its scope it embraced the legal interests of one fifth of the human race. It was concerned almost with every known system of jurisprudence and with judicial institution of every type and with every kind of dispute. The Privy Council formed a connecting link between Indian and English Jurisprudence and thus the latest developments whatsoever in the common law, they were transmitted to India.

Many Acts enacted by the Imperial Parliament were adopted by the Dominions. The Privy Council enforced a uniformity of interpretation of such Acts.

The association of the Privy Council with India subsisted for nearly one hundred and seventy five years, in the

days when the confusion in the field of substantive law was great, and the legislative activity practically negligible, the Privy Council ascertained the laws, settled them, moulded and shaped them.

The decisions were always masterly, and they form even to day the fountain source of law in India. It rendered notable judgements in the field of the Statute Law and personal laws. It contributed much to the evolution of the commercial law in India. Its interference in the criminal sphere was very benevolent.

Sh. K.M. Munshi, gave the nobler remarks on the occasion of the abolition of the Privy Council's jurisdiction –

> "The British Parliament and the Privy Council are the two great institutions which the Anglo-Saxon race has given to mankind. The Privy Council during the last few centuries has not only laid down law, but co-ordinated the concept of rights and obligations throughout all the Dominions and colonies in the British Commonwealth. So far as India is concerned, the role of the Privy Council has been one of the most important. It has been a great unifying force and for us Indians, it became the instrument and embodiment of the rule of law, a concept on which alone we have based the democratic institutions which we have set up in our Constitution."

At a time when there was no link between the various Sadar Courts, Supreme Courts, and the High Courts in India, and when they could interpret the law differently from one

another, the Privy Council provided a unifying force, a connecting link between them.

Demerits

It was constituted primarily of the British Judges, many of whom had no intimate personal knowledge of the Indian conditions and manners. The Court being insufficiently in touch with the Indian life, could not appreciate the Indian point of view satisfactorily.

The Judicial Committee situated in London, at a distance of nearly 5000 miles from India. The distant location of the Judicial Committee made the disposal of appeals very dilatory and expensive. The system put a wealthy litigant at an advantage, for he could coerce a poor opponent to surrender or compromise by his power to take the case to the Privy Council, and so the system often worked to the distinct disadvantage of the poor litigants.

More important than this was perhaps, a sentimental objection to the system. The existence of the Privy Council's jurisdiction was regarded as a symbol of 'judicial slavery'. The question was rather one of national prestige.

It happened on January 26, 1950 when the Supreme Court of India came into existence under the new Constitution, but the process of evolution of this court goes back to 1937 and the same may be traced at this stage.

M. THE FEDERAL COURT (1937)

The Government of India Act, 1935 sought to inaugurate a federal policy in India. A Federal Court is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the Constitution and a tribunal for the settlement of disputes between the constituent units of the

Federation. Consequently, the Act of 1935 provided a Federal Court in India which was established in 1937.

1. Exclusive Original Jurisdiction : The Federal Court had an exclusive original jurisdiction in case between the federation and constituent units.

2. Advisory Jurisdiction : The Federal Court had an advisory jurisdiction also. The Governor-Council could refer any legal question of public importance to the Court for consideration and opinion.

3. Appellate Jurisdiction : The Federal Court enjoyed a limited appellate jurisdiction. Appeals lay to the Federal Court from any judgement, decree or final order of a High Court, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Constitution. If the High Court refused to issue the required certificate, then the Federal Court could not hear the appeal as it had no jurisdiction to grant special leave to appeal.

In cases which involved matters of interpretation of Constitution, parties had to go in appeal to the Federal Court in the first instance.

4. Appeal From High Courts : In all other cases, appeals from the High Courts lay to the Privy Council much in the same way as they lay before the passage of the Act of 1935.

5. Power of Legislature to Extend the Jurisdiction : The Federal legislature was, however, empowered to extend the appellate jurisdiction of the Federal Court, within certain limits and consequently to abolish appeals to His Majesty in Council to that extent.

6. Appeal from Federal Court – Appeals lay from the Federal Court to the Judicial Committee of the Privy Council under the following circumstances –

(a) From the judgement of the Federal Court rendered by it in the exercise of its original jurisdiction.

(b) In any other case, by leave of the Federal Court or of His Majesty in Council.

N. RESTRICTION OF APPEALS TO THE PRIVY COUNCIL

For quite a long period after 1935, the Indian legislature took no action to extend the jurisdiction of the Federal Court and to diminish the jurisdiction of the Privy Council. However, such an action became imminently necessary in view of the changed constitutional status of India after 1947. The Federal Court (Enlargement of Jurisdiction) Act I of 1948, was passed by the Indian legislature to provide for the enlargement of the appellate jurisdiction of the Federal Court in civil cases. Under the Act, appeals were to lie to the Federal Court from any judgement of the High Courts :

(i) Without special leave to appeal of the Federal Court, in the same circumstances in which appeals could have been brought to His Majesty in Council without any special leave; and as of right.

(ii) With special leave of the Federal Court.

The previous Act had not been completely abolished. It did not touch appeals in criminal cases. Appeals from the Federal Court were still possible in certain circumstances, i.e. by leave of the Federal Court or of His Majesty in Council.

The new Republican Constitution of India was due to come into force from January 26,1950. In anticipation of the new-constitution, the Constituent Assembly of India passed on 24 September, 1949 an Act to abolish the jurisdiction of his Majesty in Council in respect of the Indian appeals, so that there might be minimum of trouble and inconvenience. In the month of September 1949, there were pending appeals, before

the judicial Committee of the Privy Council as, 70 civil appeals and 10 criminal appeals from the judgments of the various High Courts in India. The Act was due to come into force on 10th October, 1949. From the date the Federal Court, as an interim measure, was to be invested with the same jurisdiction to entertain and dispose of appeals and petitions from the Judgments, decrees or orders of High Courts of India as 'His Majesty in Council had at that time'. All pending appeals before the Privy Council were transferred to the Federal Court.

On October 10th, The day on which the new Act abolishing the Privy Council's jurisdiction came into force, India's 175 years connection with the Britain's highest tribunal came to an end.

O. THE SUPREME COURT UNDER THE CONSTITUTION OF INDIA

The new Constitution ushered into India the Supreme Court of India as The highest court of the land. The Supreme Court enjoys the following powers and jurisdictions:

1. Original Jurisdiction

The Court has an exclusive original jurisdiction in cases arising between the Centre and the constituent units.

2. Appellate Jurisdiction

(i) First in constitutional cases, an appeal lies to the Supreme Court from any judgement of the High Court, if certifies, that the case involves a substantial question as to the interpretation of the Constitution. In case the High Court refuses to grant such a certificate, the Supreme Court may itself grant special leave to appeal if it is satisfied that substantial question of law involved.

(ii) Secondly in civil matters – An appeal lies to the Supreme Court if the High Court certifies:-

(a) That the case involves a substantial question of law of general importance and (b) that in the opinion of the High Court the question needs to be decided by the Supreme Court.

Note :- Now Monetary criteria of 20,000 for civil appeal to the Supreme Court has been abolished [vide -Constitution 30th Amendment Act 1972 Article, 133(1)].

(iii) Thirdly in criminal cases - an appeal lies to the Supreme Court from a High Court, if the High Court - (a) has an appeal, reversed an order of acquittal of an accused person and sentenced him to death; (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; (c) certifies that the case is a fit one for appeal to the Supreme Court.

Recently, by the (Enlargement of Criminal Appellate Jurisdiction) Act 1970, the Supreme Court can also hear an appeal from any judgement, final order of sentence in a criminal proceeding of a High Court if - (a) it has an appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years;

(b) it has withdrawn for trial before itself any case from any court subordinate to it and has sentenced the accused to imprisonment for life or for not less than 10 years.

3. Power of Special Leave : The Constitution under Article 136 grants the powers to the Supreme Court of 'special leave to appeal' from any judgement, decree, determination, sentence or order' in any cause or matter passed or made by any court or tribunal in the territory of India.

4. Advisory Jurisdiction : The President is empowered to obtain the opinion of the Supreme Court on any question of law or fact which is of public importance.

5. Power to Issue the Writs : The Supreme Court has been empowered to issue directions or orders or writs like the Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo warranto.

6. Independence of the Supreme Court : (1) Every Judge of the Supreme Court hold office until he attains the age of 65 years; (2) A Judge shall not be removed from his office except a by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity; (3) Salaries of the Judges have been fixed by the Constitution and allowance and privileges as the Parliament may fix; (4) No discussion shall take place in the Parliament with respect to the conduct of any Judge of the Supreme Court.

7. Appointment of Judges : The president is empowered to appoint the Judges. A person can be appointed as a Judge unless he is a citizen of India and

(i) has been for at least five years a High Court Judge or

(ii) has been for atleast ten years an advocate of a High Court or Supreme Court or.

(iii) is, in the opinion of the President, a distinguished jurist. This has been inspired by American Model where one Judge is appointed from law teaching profession. There are some unequal features between Federal Court and the Supreme Court. Federal Court was envisaged

principally as the highest forum in India for the interpretation of the Constitution; the Supreme Court combines into itself the functions of both - the Federal Court as well as the Privy Council.

CHAPTER – XIV

CODIFICATION OF LAW

Introduction

History Before Charter Act 1833

I System of Law in Each Supreme Court: The following laws were applied in Supreme Courts at Calcutta, Madras and Bombay –

1. English Common Law existing upto 1726 in Britain.
2. English Statute Law existing upto 1726 in Britain provided only those provisions which suit the local circumstances and conditions - as provided by Charter of 1726.
3. Hindu Law and Mohammedan Law only in the matters of inheritance, succession and contract as per Regulations of 1781.
4. Regulations passed by Government of the presidency and has been registered in Supreme Court as per Regulating Act of 1773.
5. Statutes passed after 1726 but specially extended to India.
6. Civil Law as was exercised in Eclesiastical and Admiralty Courts.

Thus there existed no co-ordination among above written different laws. Secondly the Laws of Three Supreme Courts were not same. Thus there was uncertainty of law.

II System of Law in Each Adalat

Following laws were applied in Adalats working at Calcutta, Madras and Bombay –

1. Hindu Law and Mohammedan laws.

2. Regulations passed by Government of Each Presidency in 1781.
3. Justice, Equity and Good Conscience.
4. Acts of the parliament.

Thus there existed no coordination among above written different laws. Secondly, there was no uniformity of law in Adalats of three places. Thus, there was uncertainty and confusion of law everywhere.

III No Uniformity between the Laws of Supreme Courts and Adalats of each Calcutta, Madras and Bombay

There was no uniformity of laws exercised by these bodies.

IV Dual Regulation Power of the Govt. at each Presidency

The Govt. of each presidency was to frame laws different for each i.e. Presidency-towns and Mofussil Area as per Regulating Act 1773 and Regulation of 1781.

The situation of uncertainty was described by H.H. Dowell –

> "No one could then pronounce an opinion or form a judgement, howsoever sound upon any disputed rights of persons regarding which doubts and confusion might not be raised by those who may choose to call it in question."

V. Steps taken in England

The nineteenth century in England was the period of Bentham, a strong Advocate of codification. His test was " the greatest happiness of the greatest number" in every cause to be seen.

According to Ilbert –

> "He was an ardent supporter of law reform and is responsible for the invention of word "Codification".

His doctrine of utilitarianism had a great influence on the course of legislation in England after 1830."

Macaulay referred to the sorry state of affairs prevailing on the Indian soil during the course of debate in Parliament on the Charter Bill –

In the words of Macaulay –

"It is time that the magistrate should know, what law he is to administer that the subject should know under what law he is to live".

Macaulay also said about the need of codification in India –

"I believe that no country ever stood so much in need of a code of law as India and I believe also that there never was a country in which the want might be so easily supplied."

Macaulay also pointed out the principles upon which codification shall exist –

"Our principle is simply this -uniformity where you can have it – diversity where you must have it – but in all cases certainty."

In England, there were a few persons who doubted the need of codification in India.

1. Elphinston : who had been the Governor of Bombay was worried that the process of codification might led to a wholesale introduction of English law into the country.

2. Company's Directors opposed the proposal of codification.

Any way the influence of 'reformist' or the 'utilitarian' was more potent over 'conservative'. It was accepted that the codification i.e. the conversion of all laws into a written and systematically arranged codes" was the only answer to the

problem created by the existence of the heterogeneous laws in this country.

To achieve the object of codification of Indian laws, the Charter Act of 1833, passed by the Parliament, made provisions for the establishment of an All India Legislature, the creation of a new office of the Law Member and for the appointment of a Law Commission in India.

A. Provisions of the Charter Act, 1833

Charter Act made many vital alterations in the legislative system of India. In the first place, it created in the real sense an 'All India Legislature' having authority to make laws and regulations for all territories in the possession or under the government of the company at the time. The new Legislative Council had wide powers of legislation. It could repeal, amend or alter any laws or regulations in force in the said territories. It could make laws and regulations for all persons, whether British or Native, foreigners or others. It could make laws for all courts of justice, whether established by this Majesty's charters or otherwise. It could legislate for all places whatsoever throughout the whole and every part of the said territories, and for all servants of the Company.

This vide legislative power was, however, subject to some exceptions. It could not in any way alter the provisions of the Charter Act of 1833 itself. Neither could it change the Mutiny Acts nor could it alter the provisions of any Act of Parliament to be passed after 1833. Likewise, Council was not eligible to legislate so as to affect the prerogative of the Crown, or the authority of the Parliament, or the constitution or rights of the Company, or any part of the unwritten laws, or constitution of the United Kingdom of Great Britain and Ireland.

Directions were given to the Governor General in Council that the Governor General in Council shall forthwith repeal all laws and regulations so disallowed by the new codified legislations. The copies of such codified legislations were to be sent to 'Court of Directors'.

The laws and Regulations of the Legislative Council were to be of the same force and effect as any Act of the Parliament and was to be taken notice of by all the Court of Justice whatsoever in the same manner as any Act of Parliament. Henceforth there was no necessity of registering or publishing any law anywhere in Court or office so enacted by the Legislature.

The powers of legislation were vested in the Governor General in Council. The Council, besides the Governor General was to have four ordinary members out of whom one was to be the 'Law-Member'. The three ordinary members were to be appointed by the Court of Directors from amongst persons who had been the servants of the Company for at least ten years. The Law Member was to be appointed by the Court of Directors from amongst the persons who had not been the servants of the Company. The Law Member was not entitled to sit or vote in the Council except at meetings for making laws and Regulations. A sort of differentiation had been made between the Legislative and Administrative functions of the Governor General in Council i.e. law member had no right to sit and vote in administrative meetings of the Governor General in Council.

The Governments at Bombay and Madras were deprived of their law making powers. All legislative power in the country had been thus centralised and concentrated in one body, that is the Governor General in Council at Calcutta.

The Charter Act took certain steps towards securing a uniform and simple system of law in India. Section 53 provided that the Governor General of India in Council should, as soon as feel convenient issue a commission to such persons as the said Governor General in Council shall think fit. These persons were to constitute the Indian Law Commission. They are not to exceed five at one time. The Commissioners were required to inquire fully into the jurisdiction, powers and rules of the existing courts of justice, police establishments in the British Territories, all existing forms of judicial procedure, and the nature and operation of all laws whether civil or criminal, written or customary prevailing in those territories.

The Commissioners were to make reports from time to time. In these reports they were to be set forth fully the result of their inquiries. They were to give due regard being had to the distinction of castes, difference of religions, and the manners and opinions prevailing among different races in different parts of the Company's territories.

The creation of an all India Legislative Council in 1833 was an event of great significance. In the words of Rankin, "The Charter Act of 1833, forms a watershed in the Legal History of India." S. 53 of the Charter Act of 1833, has been characterised in the words of Rankin as the "mainspring of law reforms in India so far as regards policy though principles and ideas were still to seek." The process to which this provision looked forward had three phases as provided by section 53 viz, ascertainment, consolidation and amendment.

B. First Law Commission (1834-1843) in India

In pursuance of the provisions of the Charter Act of 1833, the First Law Commission came to be appointed in 1834. The Commission consisted of the following members:

1. Mr. And Lord Macaulay
2. Mr. J.M. Macleod.
3. Mr. G.W. Anderson
4. Mr. F. Millet.

The last three members of the Commission were from amongst the civil servants of the Company representing the three presidencies of Calcutta, Madras and Bombay. The Commission met for the first time in 1834.

The State of Criminal Law in the three provinces of Bengal, Bombay and Madras was also very confusing. In Bengal and Madras provinces, Mohammedan Law of Crimes was the Law of Land and was applied to all. The Mohammedan Criminal Law was primitive and unsuitable to a civilised country. Elphinstone Code was prepared in 1827, the Bombay system of Criminal Law had the superiority to the Law of other provinces that it was digested while the other systems were undigested. The Bombay Digest was also not perfect. The result was that there was no coherence or uniformity in the various systems of criminal law prevailing in the various provinces.

Under instructions from the Governor General in Council, the first Law Commission under the guidance of Macaulay (Law Member) proceeded with the work of drafting an Indian Penal Code. The Draft of the Penal Code which was mainly the work of Macaulay was submitted to the Government in 1837. It could not be immediately enacted into a Code. It had to wait for nearly a quarter of a century before it became law. Rankin wrote – "The commission had done brilliant work in drafting penal code, a detailed and valuable but unpublished work."

I Lex Loci Report

Great obscurity engulfed the question of the civil law which could determine the rights of such communities as Christians, Anglo Indian, Armenians etc. residing in the Mofussil. The attention of the first Law Commission was directed to this question in 1837. The remedy proposed by the Commission was that an act should be passed making the substantive law of England, the Law of the land (Lex Loci). On May 22, 1840 the Commission by following the above recommendation submitted a draft of the Lex Loci Act. Its main provisions were:

1. Only so much of the law of England was proposed to apply as to suit the people of India and was not inconsistent with any Regulation or Act of the Indian legislature.
2. It was not to apply to any person professing any religion other than the Christian religion in matters of Marriage, Divorce or Adoption.
3. Law and usage continuously observed by any race or people not known to have been ever seated in any other country than India were to be safeguarded.
4. No Act of Parliament passed since 1726 was to be applied unless the Act was specially extended to the Mofussil in India.
5. The Mofussil courts could adjudicate upon the legal rights and modify the same whenever equity and good conscience, required, in the same way as they had been doing heretofore in the case of British subjects.
6. The distinction maintained by the English Law between the real property and personal property would not be applicable in the Mofussil; all immovable properties in the Mofussil were

to be regulated by the same way as was applied to the personal property in England.

7. The distinction maintained by the English Law between the succession of the immovable property of a deceased which followed the law of the place, where the property was situated and succession to movable property of the deceased which followed the law of the place of the domicile of the deceased, was not to be affected.

8. Appeals from the courts in the Mofussil in all matters decided under the Lex Loci Act were to lie to the Supreme Court concerned instead of the Sadar Diwani Adalat.

9. In a suit brought before the court in which the cause of action had arisen before the commencement of the Act, the decision would be under the existing law of the parties or according to equity or good conscience. Thus status quo was to be maintained as regards the matters which had arisen before the proposed Act became operative.

10. Nothing in the Act was to apply to a Hindu or a Mohammedan, or to his property, unless he had renounced his religion and had adopted any other religion.

11. No Hindu or Mohammedan, by renouncing his religion, was to lose any rights or property or deprive any other person of any rights or property.

12. So much of the Hindu or Mohammedan Law which inflicted forfeiture of rights or property of any person in case of renouncing his religion or who had been excluded from the communion of any of those religion, was to cease to be enforced in the Company's Courts.

13. In any case falling within the above two clauses, it appeared to the court of trial that the application of the principles would outrage the feelings of any party against

whom the court was called upon to apply them, the court was to submit the case to the court of appeal which was to decide whether the provisions were to be applied or not and with what modifications, and what if any compensation was to be given to a party for loss sustained by him if the court of appeal decided not to apply those provisions.

Evaluation : The question was of peculiar difficulty and delicacy. The Report of the Commission was circulated to all the Local Governments, Sadar Courts and other officers of judgement and experience in the several Presidencies for their opinions and criticism.

The Report of the Commissioners was criticised very vehemently by some quarters. A serious objection against it was that the Mofussil Courts, from unavoidable defects of technical knowledge of the English Law, would find it practically impossible to give effect to the proposals.

Ultimately, the proposal of the Law Commission died by the effux of time. Nothing concrete was achieved. The value of the Report lay in the fact that it directed the attention of the intelligentia in the country to the magnitude and the complicacy of the problems inherent in the process of codification of laws in India. The report provoked a good amount of thinking on the part of the authorities.

II The Caste Disability Removal Act 1850

One portion of the Lex Loci Report of the first Law Commission was however, immediately implemented. According to both Hindu and the Mohammedan Laws, conversion meant forfeiture of rights of property. The Christian Missionaries did not like the law. They made representation to the Government on this score. So far as Bengal was concerned a law had already been enacted to that

effect in Sec. 9, Regulation VII of 1832 that renunciation of the Hindu or the Mohammedan religion should not entail the loss of rights to property. The first Law Commission suggested extension of the principle to the whole of India.

Legislative sanction was given to this principle in 1850 by Act XXI of that year. The Act of 1850 came to be known as the "Freedom of Religion Act" or "Caste Disability Removal Act".

Lord Macaulay, as its Chairman, had furnished the motive force to the first Law Commission. With his retirement from the Law-membership of the Government of India, activity of the Law Commission ceased and it languished into inactivity.

C. The Charter Act of 1853

The Charter Act of 1853 made certain modifications in the legislative arrangements installed by its predecessor - the Charter Act of 1833.

Under the Provisions of the Act 1833, the Law Member was not entitled to sit or vote in the Governor General's Council except at meetings held for making laws and regulations. The Charter Act of 1853 repealed this provision. Thus making the Law Member a full fledged member of the Council.

For the better exercise of the powers of making laws and regulations vested in the Governor General in India in Council, the Act of 1853 augmented that body of legislative council by the addition of a few more persons so as to constitute a new Legislative Council. Besides the Governor General and Council, the new legislative council was to consist of :

1. One member from each Presidency having been servants of the Company for at least 10 years.
1. Chief Justice of the Supreme Court, at Calcutta.
2. One Judge of the Supreme Court of Calcutta to be named by the Governor - General.
3. The Court of Directors could direct the Governor-General to add two more persons being or having been servants of the Company for at least ten years.

The difference between the Legislative Council and the Executive Council thus became more pronounced and marked. No law made by the Legislative Council was to be valid and was to have any force until it had been assented to by the Governor-General.

Further, the new Act of 1853 contained certain provisions for the re-appointment of a Law Commission in England. The first Law Commission had a series of Reports, recommended extensive alterations in the judicial establishments, judicial procedure, and laws in force in India. No final decision had been taken on these Reports. It was therefore, necessary to make provision for the appointment of a new Law Commission for India. Accordingly, the new Act laid down that it should be lawful for Her Majesty, to appoint a law commission consisted of several persons in England to examine and consider the recommendations of the First Law Commission, and the enactments proposed by it for the reform of the judicial establishments, judicial procedure, and laws to be referred to them for their considerations. The Law Commission was to report its opinions to Her Majesty on the matter aforesaid within three years after passing of the Act of 1853. Hence the place of commission was suggested to be changed from India to England.

D. The Second Law Commission (1853-56) in England

Under the provisions of the Charter Act of 1853, a Law Commission, known as the Second Law Commission came to be appointed in England on 9th November, 1853. The Commission consisted of the following gentlemen:

1. Sir John Romilly, Master of the Rolls as chairman.
2. Sir John Jervis
3. Sir Edward Ryan.
4. R. Lowe afterwards Lord Sherbrook
5. C.H. Cameron.
6. J.M. Macleod. (Also member in First Law Commission)
7. T.F. Ellis.

The purpose of the Commission was to examine and consider the recommendations of the first Law Commission and to make recommendations for the reform of Courts, procedure and law in India. The Commission worked till the middle of 1856. During this period the Commission produced four Reports, out of which second is the most important Report as it contains the recommendations of the Commission regarding the grounds on which the future work of codification of the substantive law in India was to proceed. Here reference is given firstly of second report then about other reports:

I The Second Report of the Law Commission

The Second Law Commission in its second Report suggested the policy and the principles on which the work of codification in India was to proceed in future.

In the first place, the Law Commission pointed out the needs of India in respect of 'substantive civil law'. Beyond the capital towns of the three presidencies, there was no substantive law for the various classes of persons other than the

Hindus and the Muslims, who had no special law of their own. This was a great want which had to meet.

It is clear that there was a very great difference between the state of law in the Provinces and the Presidency towns. It produced much inconvenience.

After giving attention and considerations to the means of remedying the great defects in the State of Laws in India, the Commission came to the conclusion that "What India wants is a body of Substantive Civil Law, in preparing of which the Law of England should be used as a basis; but which, once enacted, should itself be the Law of India on the subject it embraced."

The Commission further recommended that such a body of Law should be prepared with a constant regard to the conditions and institutions of India, the character, religions and usages of the population. The Law thus enacted was to be uniformly applicable to all persons and all places though it also envisaged the possibility of certain exceptions. For the Commission observed–

> "If, on any subject embraced in the new body of Law, it is deemed necessary that for a particular class of persons or for a particular district or place there should be law different from the general law, and if there shall be no particular and cogent objection to the insertion of such special law into the proposed body of law, such special law, we think ought to be provided in that way."

The Commission made a very significant recommendation. It gave its verdict against the attempt to codify either of the personal laws of the Hindus or the

Muslims. In the opinion of the Commission, "no portion either of the Mohammedan Law or of the Hindu Law ought to be enacted as such, in any form by a British legislature. Such legislation, we think, might tend to obstruct rather than to promote the gradual progress of improvement.

The Commission concluded by saying, 'We have the satisfaction of being able to state our opinions as to the defects in the state of the substantive civil law in India, and the expediency of framing and enacting a body of laws for India based upon English Law, are very much in accordance with the views of the First Law Commission in its 'Lex Loci Report'.

II Other Reports : Few Codes Enacted

In its other reports, the Second Law Commission submitted a plan for the amalgamation of the Supreme Courts and the Sadar Courts, a uniform Code of Civil Procedure and also a uniform code of Criminal Procedure applicable to all the courts in British India.

The events in India in 1857, however, introduced a new urgency in the whole scheme of things. In 1858, the Government of India was assumed by the Crown. This was rapidly followed by several codes in quick succession. In 1859, the Indian Legislature enacted the Code of Civil Procedure. In 1860 followed the Penal Code, in 1861, the Code of the Criminal Procedure. The Act of Limitation was passed in 1859 immediately after the Code of Civil Procedure.

The life of the Second Commission was short, it being expressly restricted to three years under the Act of 1853. Within this period it was impossible for the Commission to complete such an edifice as they projected or even lay its foundations, but they did great work when they laid out the

scheme and the principles on which the future work of codification was to proceed in India.

E. The Third Law Commission (1861-1870) in India

In December, 1861, a fresh Commission was issued to certain persons for the purpose of preparing a body of substantive civil law for India. The fresh Commission was expressly based on the second Report of the previous Commissioners. The new Commissioners were directed to frame "a body of substantive law, in preparing which the Law of England should be used as a basis, but which once enacted should itself be the Law of India, on the subject it embraced and also for the purpose of considering and reporting on such other matters relating to the reforms of the Laws of India as might be referred to them by the Secretary of State for India."

The Commission was originally issued to :

1. Sir John Romilly, Master of Rolls (as Chairman, also Chairman in Second Law Commission)
2. Sir. W. Erle, Chief Justice of the Common Pleas
3. Sir Edward Ryan (Also member in Second Law Commission).
4. Mr. Robert Lowe (Lord Sherbrook)
5. Mr. Justice Willes and
6. Mr. J.M. Macleod (Also member in First and Second Law Commissions).

The issuing of the third Law Commission was a very significant event in the process of codification of Indian Laws. According to Rankin–

> "The third Law Commission set on foot the work of drafting and may be taken as the end of the discussion or policy and as closing – if not a chapter at least a paragraph of British Indian

History which may be entitled 'The Codes are Coming".

The third Law Commission submitted seven reports containing the drafts of proposed rules of law to the successive Secretaries of State, who transmitted these various drafts to the Government of India with a view to prepare their legislation. In the first instance, the Commissioners directed their attention to the preparation of the Law of Succession and inheritance generally applicable to all classes other than the Hindus and the Mohammedans. The first report submitted on June 23, 1863, contained a draft which with little variations became the Indian Succession Act, 1865. The Second Report, dated July 18, 1866 contained a draft of the Law of Contract. In their third Report, dated July 24, 1867, they submitted a Draft of the Law of Negotiable instruments. In their Fourth Report in1867, they replied to certain remarks of the Government of India relating to Specific Performance. Their fifth Report, dated August 3, 1868, contained a Draft of the Evidence Act. Their Sixth Report dated, May 28, 1870 they submitted a draft of the Law of Transfer of Property. Their seventh and the Last Report was dated June 11, 1870 and dealt with the revision of the Criminal Procedure Code.

In the meantime, certain differences of opinion arose between the Commissioners and the Government of India over certain features of the Contract Bill as drafted by the Commissioners. The Select Committee of the Legislative Council made numerous alterations of great importance in the Contract Bill, which the Commissioners did not like. They therefore, resigned in 1870 on the ground that their drafts were not being enacted by the Indian Legislature with as it is contents and in short period.

Thus the Commissioners were becoming restive and dissatisfied at the delay in enacting their draft Bills. And thus expired "In huff", as Illbert says "The Third of the Indian Law Commissions."

F. The Fourth Law Commission (1879) in India

The Government of India suggested that the following branches of substantive law might be codified i.e. trusts, easements, alluvion, diluvian, master and servant, negotiable instruments and transfer of immovable property. On 11th February 1879, the Government of India appointed a Commission to consider the provisions of these Bills, to report thereon and to make suggestions as to codification of the substantive Law of British India. The Commission was composed of (1) Dr. Whitley Stokes, (2) Sir Charles-Turner, the then Chief Justice of Madras High Court and (3) Mr. Raymond West, a judge of the High Court of Bombay. The Commission submitted its report on the 15th November, 1879.

The Commission made the following specific recommendations in their Report :–

1. The process of codification of substantive law should continue.
2. The English Law should be made the basis of the future codes in India and its material should be recast.
3. The Eventual combination of those divisions as parts of a single and general code should be borne in mind.
4. In recasting English Materials, due regard should be had to native habits and modes of thought. The forms and propositions of codes should be broad, simple and readily intelligible.
5. Uniformity in legislation should be aimed at; but local and special customs should be treated with great respect.

6. Existing law of persons should not be extended at present by codification except the operation of the European British Minors Act, 1874.
7. The laws relating to negotiable instruments, transfer of property, trusts, alluvion, easements and master and servant should be codified and Bills already prepared should be passed as law subject to suggested amendments.
8. Concurrently the laws relating to insurance, carriers and lien should be codified.
9. The 'Law of actionable wrongs' should be codified.
10. The legislature should deal with the 'Law of Property' in its whole extent.
11. Preparation should be made for a systematic chapter on 'Interpretation'.

In accordance with these recommendations, the Legislative Council of India enacted in 1881 the Code relating to the Negotiable Instruments, and in 1882, the Codes relating respectively to Trusts, Transfer of Property and Easements. In the same year also passed revised edition of the Codes relating to Companies, Civil Procedure, and Criminal Procedure.

With the end of Fourth Law Commission, came to an end the phase of formal codification of Law in the British India. No more commissions were appointed thereafter. By the end of the nineteenth century, a feeling had descended upon the British Legislators in India that enough had been done by way of codification.

Evaluation

The period of codification was ushered into the country in 1833 with Macaulay's Commission and the effort bore fruit after many years, in the forms of Anglo-Indian Codes. Condition of Law at that time was very chaotic. There was

need of substantive law, also need of removing the conflict, contradiction and confusion among various existing laws, rules, customs and regulations. The Judges were in a problem to decide the law to be applied. The law made by the judge was necessarily scattered over a large number of volumes. A commendable task was the creation of a uniform lex loci.

Uncertainty of law promotes unnecessary litigation. Stephen has rightly pointed out –

> "The Code would include in a single volume of very moderate size a far larger amount of law thrown into the shape of specific propositions and arranged in a consecutive and systematic manner then English lawyers in general can possibly be acquainted with when they begin the practice of their profession".

Pollock praises the Indian Codes by saying that "are the best models yet produced. Codification provides legal unity in the country". As regards Indian Laws Rankin said, "The English Common Law was transferred to India so much by reception as by codification."

No native was ever a member of the Law Commission before independence of the country which signals the deficiency of suitability of the laws enacted those time upon the natives.

After the independence of the country, first Law Commission was appointed in 1955. Though the Law Commission is not yet a constitutional or statutory body and is appointed by the Government of India for every three years i.e. from September 1 to work for the next three years ending on August 31. Its continuity so far has given it an almost permanent character.

Political considerations play their part many times in contents of legislation. With an exception of Professor P.K. Tripathi, no academic lawyer has ever been made a full time member of the Commission. Sometimes, important reports of the Commissions are not found support of the Government hence go into oblivian.

Appreciating codification, Pollock observed, "It is an instrument of new constructive power, enabling the legislator to combine the good points of statute law and case law while avoiding almost all their respective drawbacks." Solution to the problem of accumulated mass of comments and decisions, Sir James F. Stephen said that re-enactment of the various codifying Act is "as necessary as repairs are necessary to a railway. If you want your laws to be really good and simple, you must go on re-enacting them as often as such a number of cases are decided upon them."

Against codification, views were expressed that it checks the natural growth of Law, it stereotypes the law and restrains its elasticity. Halsbury also criticised the codification as "A Code is a want developed by progressive and unscientific legislation and that it is impossible to have a Code which shall be complete and self-sufficing." But the fact shall have to be accepted that codification helps in legal development, formulate the law authoritatively, comprehensively. The views of economists, social scientists, lawyers, engineers should be taken in drafting a law of their respective fields, then a good result of clarity and justice to the objects and reasons of the law intended can be achieved.

CHAPTER – XV

GROWTH OF PERSONAL LAWS IN INDIA

Introduction

Warren Hastings was supporter of the policy of applying the personal laws to Hindus and Muslims respectively. In his opinion it would be a great evil to impose on the Indian people a foreign legal system. Because the English Judges were ignorant about the personal laws, therefore he made available to these judges the help and assistance of the native law officers, Pundits and Kazis who were to expound the principles of indigenous laws applicable to the set of circumstances proved before the judges.

Dr. U. C. Sarkar rightly observed about the wisdom of British rulers that

> "They began with the policy of non-interference and generally allowed the then existent system of law to prevail; but gradually they began to assert themselves being, of course backed by a strong fraction of the public opinion"[1]

He further writes–

> "Though as a matter of fact the British Rule was introduced in India by the assumption of Diwani by the East India Company in 1765, the actual influence of the British Administration, particularly in the development of the Hindu Law, could not take place so prominently before the middle of the 19th century. Constitution of the Legislature and the establishment of the High

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[1] U.C. Sarkar, *op.cit.*, p. 357.

> Courts with their subordination to the Privy Council served as impetus for the developments of the Hindu Law. The legislature began to introduce new laws modifying old ones and the courts of justice also began to pronounce judgments which were not always with the genius of the orthodox Hindu system of law."[2]

Warren Hastings by judicial Regulation of August 21, 1772 expressed as –

> "in all suits regarding inheritance, marriage, caste and other religious, usages or institutions, the laws of the Koran with respect to the Mohammedans and those of the Shastar with respect to the Gentoos shall be invariably adhered to".

For Hindus, he used the word 'Gentoos'. The policy of governance of Muslims and Hindus by their respective personal laws was repeated in the Act of settlement in 1781.

To deal with the area of silence or ambiguity over a issue of law, Sir Elija Impey by Regulation dated July 5,1781 provided that in those cases where there was no specific directions the judges had to act according to justice, equity and good conscience. By another Regulation of 1831 the same principle of justice, equity and good conscience was directed to be applied by Munsifs. In this way a gateway was opened to introduce the English law and reasonableness in the personal laws.

Proper development of personal laws took place by two means i.e. legislation and adjudication as also realized by Dr. U. C. Sarkar–

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[2] *Ibid.*, p. 358.

> "Legislation and adjudication were the two most conspicuous instruments that were vitally responsible for the steady and systemic development of Hindu Law during the British Rule, particularly from the later part of 19th century".[3]

Certainly legislation makes the law systematic and certain whereas adjudication by judiciary removes the conflicts and fills up the gap with the help of justice, equity and good conscience. The role of legislation, adjudication and legal work in developing the Personal laws is discussed herewith.

A. Role of legislation in Development of Personal Laws

During British period following legislations were passed which crystalised and changed the Hindu and Mohammedan personal laws :

1. The Caste Disabilities Removal Act,1850

The Act abolished the existing principle of Hindu and Mohammedan laws which provided forfeiture of right in property in case of conversion of religion.

2. The Native Converts Marriage Dissolution Act, 1866

The Act provided continuity of matrimonial rights even after conversion of religion by any spouse except the dissolution of the marriage under the Act. The Act indicates broadmindedness of the law makers.

3. The Hindu Widows Remarriage Act, 1856

The Act permitted remarriage of the widows in certain circumstances which was a humanitarian approach.

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[3] *Ibid.*, p. 336.

4. Act III of 1872, Act XXX of 1923 and the Arya Marriage Validation Act, 1937

All these Acts permitted inter-caste and inter-religion marriages. A Hindu did not cease to be a Hindu after marrying with a Mohammedan or Christian female.

5. Law of Wills

Introduction of system of Wills in Hindu law was provided by Act XXI of 1870, Act V of 1881 and the Indian Succession Act of 1925.

6. The Majority Act, 1875 and the Guardian and Words Act, 1890

For the first time, the Act of 1875 fixed the age of majority at 18 except in cases of marriage, divorce and adoption. The provisions of the Act of 1890 were applicable on that Hindu whose guardian was appointed by the Court.

7. **The Hindu Inheritance (Removal of Disabilities) Act, 1928. The Hindu law of Inheritance Act 1928 and the Hindu Women's Right to Property Act,1937**

The Act of 1928 removed the disabilities which prevented a Hindu from inheritance or a share at the time of partition. The second Act provided the change in order of inheritance and succession under existing Hindu law. The Act of 1937 provided widow's life interest in the property of her deceased husband. This Act created a new right for widows which was certainly a humanitarian and social approach.

8. Child Marriage Restraint Act,1929

The Act of 1929 and later amended Act 1938 provided minimum age of Hindu marriage. At that time, existing Hindu law did not have such fix age rather preferred early marriage of girls.

9. Hindu Gains of learning Act, 1930

The Act provided that a Hindu who earns property through some special knowledge is his exclusive property as his self acquisitions and not the part of the joint Hindu family property even that special knowledge might have acquired at the expense of the joint Hindu family property. This Act negated the capitalism and advocated entitlement of skillful persons over the property he earned.

10. The Waqfs Act of 1913, the Shariyat Act of 1937 and the Dissolution of Muslim Marriage Act, 1939

Out of these Mohammedan Laws, first is in conformity with Muslim law which provided validity to the family Waqf. The Act of 1937 extended application of Muslim law over khojas, Memons and Vohras in all matters. The Act of 1939 created the right of judicial separation for Muslim Wife against her husband which was uncertain till then. This Act improved the position of aggrieved Muslim wives hence the step can be called a humanitarian and social approach.

Not only the above legislations rather many codes and other laws were also enacted vide the chapter on Codification of Law in this book which was the outcome of long effort to concretize and systematize the personal laws.

B. Role of Adjudication in Development of Personal Laws

Adjudication means the role of judiciary in the development of personal laws. Because it was the judiciary which interpreted the law and facts and ultimately gave the shape to the personal laws. Judge-made laws had effected every legal system. Dr. U. C. Sarkar gave due importance to the adjudication. He wrote, "If legislation played an important

part in the development of Hindu law, a still more important part was played by the decided cases in its re-orientation"[4].

He further observed–

> "It can be generally asserted that the modifications, effected during the British period through adjudication on the original Hindu law were largely in consonance with the spirit of the society, resulting from the contamination of the Western and the Eastern civilization. Orthodox-adherence to the pure Sanskritic law would clearly be an anachronism at this day. ..... As a matter of fact, to an impartial observer, the spirit of Hindu Code Bill and the ultimate fragmentary Act had been virtually for the acceleration of the tendencies that had already become manifest in the modifications, effected during the British rule. In the history of Hindu Law, the changes never appeared to be too violent for the genius of its system, as it was always accommodating and the subservient to the spirit of the age and the society."[5]

Definitely it was in the hands of judiciary to curtail or accelerate the application of law. Judiciary was also empowered to deal the custom or usage in its manner under discretion. The role of adjudication is discussed under the following heads -

(i) Principle of Justice, Equity and good Conscience

The principle found its initial place in the Regulation of 1781 introduced by Impey which reads as under :-

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[4] U.C. Sarkar, *op.cit.*, 374.

[5] U.C. Sarkar, *op.cit.*, p. 389-390.

"in all cases within the jurisdiction of the Mofussil Diwani Adalats, for which no specific directions are hereby given, the respective judges thereof do act according to justice, equity and good conscience." In this way the English law was supplemented in the silent or gap area of the existing personal laws. About the principle, the Privy Council observed, "Justice equity, and good conscience had been generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances"[6].

(ii) Factum Valet

In Dayabhaga Jimutvahana adhered a principle that "a fact cannot be altered by hundred texts." This principle was meant to establish the absolute right of the father to alienate the family property till he is owner of it. Whereas this principle was also applied to marriage and adoption by the courts.[7]

(iii) Gains of Learning

The principle of Hindu Law was that if learning was at the expense of the joint family property then earnings due to such learning (i.e. special knowledge) were considered to be part of joint family property. But the courts categorised the 'learning' into learning of science and ordinary learning. In the first case the earnings (i.e. gains) were constituted as part of joint family property and in the second case such earnings were termed as self acquisitions.[8] Ultimately the controversy was solved by the passing of the Hindu Gains of Learning Act, 1930 which has been already discussed above.

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[6] U.C. Sarkar, *op.cit.*, 380.

[7] *Wooma Devi* v. *Gokula Nand* 5.1.A., 40; *Balusu* v. *Balusu*, 26. 1A., 113.

(iv) Concept of Debts

Under the Mitakshara School of Hindu Law joint family property is not responsible for personal debts of any member of the family. But the courts took the different news by pronouncing that sons are under a legal duty to pay the debts of their father out of the entire joint family property unless the debts are for immoral purpose.[9] The courts also held that the interest of a coparcener in the undivided coparcenery property is saleable in execution of a money decree against him.[10]

(v) Concept of Adoption

The position under a Hindu text was that an only son could not be given or taken in adoption. But the Privy Council took the different view that an only son could be adopted.[11]

(vi) Theory of Spiritual Benefit

According to British Courts under Dayabhaga School of Hindu Law the Pinda theory or the theory of spiritual benefit is the only guide for inheritance.[12] But contrary view was expressed by Dr. Bhattacharya and Sarvadhikari that such intention was never existed in Dayabhaga or Mitakshara schools.

(vii) Concept of Wills

The concept was unknown to Hindu Law but the British Courts enunciated this concept into Hindu Law[13] which exists even today.

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[8] *Mathey Ram* v. *Rawa Chand*, 45 1.A., 41.; *Gokul Chand* v. *Hukam Chand*, 48 1.A., 162.

[9] *Girdhari Lal* v. *Kantoo Lal*, 1. 1.A. 132.

[10] *Din Dayal* v. *Jagdeep*, 41 1.A., 247.

[11] *Guru Gobind* v. *Anand Lal* (1987) Bengal 1.R. 15.

[12] *Ibid.*

[13] *Bir Pratap* v. *Rajendra Pratap*, 12 M. 1. A. 137.

(viii) Concept of Stridhana and Hindu Women's Estate

Under the Mitakshara, the property inherited by a widow from her husband was termed as Stridhana yet such property was not her absolute property. She could use or enjoy it.

The Privy Council developed the concept of "women's Estate" which could be inherited by heirs of the husband after the death of the widow.[14]

Consequently, the Hindu Women's Right to Property Act 1937 was passed according to which a life interest of a widow was provided in the property of her deceased husband and still she was not made the full or absolute owner. After independence of India, section 14 of Hindu Succession Act, 1956 made her full owner of such property.

C. Role of Legal Work in Development of Personal Laws

Because many courts were presided by English Judges and they had to decide the disputes involving Hindu and Muslim law. Therefore, there was necessity of authoritative works, well compiled in English language. The Governor General Warren Hastings did this commendable job for the first time. At his instance, a code of Hindu Law was prepared in 1775 with the active help of ten Brahmins of Bengal. This code was translated into Persian language and later on it was translated into English language by Halheid which was known as Code of Gentoo Laws or the Gentoo Code applicable on Hindus. In the area of Mohammedan Law, he got translation of 'Fatuwa Almgiri'. He also got translation of "Hedaya' into Persian with the help of four moulvis afterwards the same was translated into English language by Hamilton.

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[14] *Thakur Devi* v. *Raj Balak Ram*, 11 1.A. 139; *Bhagwan Din Dubey* v. *Maina Bai,* M.1.A. 487.

Justice Jones of the Supreme Court of Calcutta also prepared the work on Mohammedan Law of Succession and the Institutes of Hindu Law in 1794. He was desirous to prepare Digest of Hindu Law but it remained incomplete due to his sudden death which was ultimately completed by Pandit Jagannath. The same was translated in English by Colebrooke.

Later on, many works were produced. Sir Francis Macnaughtan prepared 'Considerations Upon Hindu Law' in 1824. Sir William Hay Macnaughtan prepared 'Principles and Precedents of Mohammedan Law' in 1825. Other works came as Myne's 'Treatise on Hindu Law and Usage' in 1887 and Neil Daille's Treatise on the Law of Inheritance applicable on Muslims. In addition to the above, other works were also came by native and foreign writers which had conflicting versions due to non-acquittance with native languages, local customs and usages.

Thus the development of personal laws continued throughout the English period. The legislation, adjudication and legal works undoubtedly contributed much. Many orthodox or unreasonableness were removed and silent areas were filled up. After independence of the country, these laws were compiled and rationalised.

Hindu Law after Independence of India

Several Acts were passed by the Indian Legislature viz. the Hindu Marriage Act, 1955; the Hindu Minority and Guardianship Act, 1956; the Hindu Adoption and Maintenance Act 1956; the Hindu Succession Act, 1956 which cover the marriage, minority, guardianship, adoption maintenance and succession aspects but still custom has a reserved place in these Acts. Section 125 of Criminal Procedure Code, 1973 regulates maintenance of parents, wife and children.

Muslim Law after Independence of India

Before independence the Shariat Act, 1937; the Child Marriage Restraint Act, 1929; the Dissolution of Muslim Marriage Act, 1939; Waqf Validating Act, 1913 were passed which are still operating. Few enactments were made after independence for instance the Muslim Women (Protection of Rights on Divorce) Act, 1986; the Muslim Women (Protection of Rights on Divorce) Rules, 1986. Section 125 of Cr. P.C. regulates the claim of maintenance but not for divorced wife.

Judicial decisions also have played important role in explaining the above Acts of Hindus and Muslim personal laws.

Uniform Civil Code

Uniform Civil Code is an ideal dream but could not be seen materialised. In India, there is multiplicity of family laws. The Christian Marriage Act, 1872, the Indian Divorce Act, 1869, the Indian Succession Act, 1925 for Christians. The Jews are governed by their uncodified customary marriage law and their succession by the Succession Act of 1925. The Parsis have their Parsi Marriage and Divorce Act, 1936. A secular code is also available i.e. the Special Marriage Act, 1956 under which any two Indians of any religion may marry but their succession is governed by the Indian Succession Act, 1925. The Act of 1956 is a permissive and of optional nature. Customary laws of each religion have still binding force and place in the codified laws. Counting of customs is like calculation of stars in the sky. For Hindus and Muslims a list of Acts have already been discussed which govern them respectively in addition to their separate customs.

Muslim law allows polygamy whereas all other laws disallow it. Yet many Muslim countries have prohibited

polygamy. V. Khalid Judge of the Kerala High Court pointed out the unbridled power of the muslim husband to divorce in *Haneefa* v. *Pathummul Beevi*[15],

> "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed."

Justice Krishna Iyer in *Shahulameedu* v. *Subaida Beevi*[16] referred the muslim scholarly opinin to prove that Koran enjoined monogamy upon muslims and polygamy is an exception. *Mohd. Ahmed Khan* v. *Shah Bano Begum*[17] which is popularly known as Shah Bano case was pronounced by the Supreme Court establishing the right of maintenance of a divorced wife. But this verdict was very much opposed by one section of the muslims. Ultimately accepting the demands of a section of the muslim community, the Indian Parliament passed the Muslim Women (Protection of Rights on Divorce) Act 1986 by which the muslim husbands were exempted from maintenance claimed by their divorced wives. The verdict of the Supreme Court was a move towards uniformity of personal laws but remained unexecuted.

The Charter Act, 1833 and the First Law Commission in 1840 advocated for uniform civil code. After independence, the Indian Constitution under Article 44 of the Directive Principles of State Policy embodied this goal as "The State

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[15] 1972 K.L. T. 512.
[16] 1970 K.L.T. 4.
[17] A.I.R. (1985) SC 945.

shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." But even after passage of 50 years this dream is still golden and could not become gold. Yet reasoning proves that Uniform Civil Code will create uniformity among personal laws which will draw better results in comparison with diversity which always results in destruction. Uniform Civil Code can solve the serious problems of couples of different religions in a simple way if dispute arises on marriage, divorce, maintenance succession etc.

CHAPTER – XVI

HISTORY OF LAW REPORTING IN INDIA

Introduction

Doctrine of Precedent

Precedent means to follow decisions pronounced by the superior courts while deciding the case in hands. In England, the theory is firmly established. The theory made the development in common law in England. The theory of precedent was also adopted in India since the advent of the British system of justice. As early as 1830 Dorin who became Judge of the Sadar Diwani Adalat at Calcutta advocated this theory but in his opinion the earlier decisions must be followed not only by the subordinate courts rather superior courts should also follow their own decisions pronounced earlier.

Though no rule was framed to the effect of precedent, however judicial decisions of the Privy Council and the High Courts (Under the British rule) supported this theory in number of cases. But the Privy Council and the High Courts were not bound by their own decisions.

This theory got limited statutory recognition through Section 212 of the Government of India Act, 1935 which provided that the decisions of the Privy Council and the Federal Court would be binding upon the courts in India.

Hence the theory caused the uniformity in decisions and certainty in Law. Obviously, publication of the decisions started in practice. Under the present Constitution of India, Article 141 lays down that the law declared by the Supreme Court shall be binding on all courts within India. So far as decisions of High Courts are concerned, these are followed by the subordinate Courts. Here discussion is made historically

about the development of the theory of precedent alongwith law reporting.

Reports of the Supreme Courts under British Rule

Law reporting was initiated with the creation of the Supreme Court at Calcutta in 1774. In the beginning, Law reporting was a private enterprise in which practicing lawyers and judges took the pain in the preparation. Sir Francis Macnaughtan, formerly a Judge of the Court on his work "Considerations upon Hindu Law" published in 1824 covered the cases involving questions of Hindu Law. Sir William Macnaughtan prepared the work "Dissertations on Mohammedan law published in 1825. Longueville Clarke's edition of the Rules and Orders of the Supreme Court was published in 1829 containing notes of cases. In 1834 Smoult's Collection of Orders from 1774 to 1813 was published in 1834.

Gradually number of reports came in appearance. For the Supreme Court of Calcutta, Morton's Reports are the earliest covering the period from 1774 to 1841. In addition to it there are Bignell's Reports covering the period from 1830-31. Fulton's reports containing cases from 1842-44. Morton's Reports by Montriou published in 1846 in which Montriou collected the cases from Morton's Reports. Other reports are Boulnois Reports 1853-1859; Gasper's Commercial cases 1851-1860; George Taylor's Reports 1847-1848; Taylor and Bell's Reports 1847-53. Gasper's Reports 1850-59. Chief Justice Sir Edward Hyde East collected Calcutta Supreme Court cases in manuscript form and placed before Morley who published them in extenso in 1850.

As regards reports of Bombay Supreme Court, Sir Erskine Perry, formerly chief justice prepared the collection popularly known as Perry's oriental Cases.

As regards reports of Madras Supreme Court, Chief Justice Sir Thomas Strange published the collection of cases from 1798 to 1816.

The above reports were not easily available as they went out of print with the passage of time. Courageous step was taken to reprint these reports in a new series known as the Indian Decisions (old Series) in 1911. First three volumes of the Indian Decisions (old Series) contained Calcutta Supreme Court cases. Fourth volume consisted of Bombay Supreme Court cases whereas fifth volume comprised of Madras Supreme Court cases.

Reports of the Sadar Diwani Adalats

At the apex of the mofussil Judicial system, there were Company's courts known as Sadar Diwani Adalats. Sir William Macnaghtan the then Registrar of the Sadar Diwani Adalat Calcutta started the first printed reports of the cases decided by the Adalat in seven volumes covering the period from 1791 to 1849. Monthly reports started form 1835 on wards which came to be known as Bengal Sadar Diwani Adalat Reports.

Reports of the Sadar Diwani Adalat Madras were few. A volume was published in 1843 known as "Decrees in Appeal Suits determined in the Court of Sadar Adalat" covering the selected decrees from 1805 to 1826.

Act XII of 1843 was passed which directed the Sadar Adalats to record their judgements in English. As regards Sadar Diwani Adalat Bombay, there are two collections. The first is series of reports published in two volumes in 1825 by Borradaile, a judge of the Bombay Adalat. Second is a volume published in 1843 prepared by the Deputy Registrar of the Adalat covering the cases chronologically from 1820 to 1840.

Reports of the Sadar Nizamat Adalats

Reports of criminal administration are few in comparison with civil administration. About Sadar Nizamat Adalat Calcutta, series of reports are in five volumes out of which two volumes were prepared by Sir William Macnaughtan and the remaining three volumes have no reporter's name. A monthly series of cases started in 1851.

The reports of Bombay Adalat covering the period from 1827-1846 published in 1848 were compiled by Bellasis, Deputy Registrar of the Adalat.

Monthly reports of the Madras Adalat began to appear in 1851.

Reports of High Courts (Under British Rule)

The Indian High Courts Act, 1861 was passed hence The High Courts were established in 1862. For Calcutta High Court, Bengal Law Reports were published in 15 volumes covering the period from 1868-76.

For Bombay High Court, Bombay High Court Reports were published in 12 volumes covering the period from 1862-1875.

In the above reports facts as well as arguments were reported in unsatisfactory manner. In addition to Govt. Publications some private publications were also appeared.

The Indian Law Reports Act, 1875

In 1872 Sir James Fitzjames Stephen, the Law Member of the Government of India pointed out many drawbacks in the system of Law Reporting in his minute while observing the administration of justice in British India.

With this view, the Indian Law Reports Act was passed on 1875 to authorise the publication of Reports. Section 3 of the Act provided, "No Court shall be bound to hear cited, or

shall receive or treat as an authority binding on it the report of any case decided by any of the said High Courts on or after the said day other than a report published under the authority of the Governor - General in Council".

Hence the Act bears importance with two folds reasons namely : henceforth the old reports will not have binding force excepts the reports published under the authority of the Governor- General in Council. And the theory of precedent got the shape of binding force. Consequent to the Act, an official series of reports appeared which were known as the Indian Law Reports (I. L. R). For Madras High Court the reports were denoted as I. L. R. Madras, for Bombay High Court as I.L.R. Bombay and so on for every High Courts.

Publication of Private Reports

The delay in reporting cases, incompleteness and costliness of the official reports led to the publication of private reports. Private reports also covered unreported decisions. More than 100 private reports were in the field. Only well known reports are mentioned here. The Madras Law Journal started publication in 1891 from Madras covering cases of the Madras High Court, the Privy Council and at present the Supreme Court. Similarly, the Allahabad Law Journal started publication in 1904 from Allahabad covering cases of the Allahabad High Court, the Privy Council and the present Supreme Court but it ceased publication in 1974. It resumed publication under the management of the All India Reporter from Calcutta. Indian Cases started publication in 1909 from Lahore covering the cases of all High Courts but it ceased in 1946 due to partition of the country. The Bombay Law Reporter started publication in 1899 from Bombay. The most well known private publication in present days is All India

Reporter (i.e. A.I.R.) from Nagpur which started in 1922 covering cases even from 1914 and continues upto date. The A.I.R. covers today cases of All High Courts, Judicial Commissioners and the Supreme Court including earlier decisions of the Privy Council and the Federal Court before establishment of the Supreme Court.

Other private reports are Calcutta Weekly Notes, Kerala Law Times, Patna Law Times, Nagpur Law Journal, Madras Weekly Notes, Madras Law Journal (Criminal), Taxation Law Reports, Labour and Industrial Cases, Income Tax Reports, Labour Appeal Cases, Company Cases, Sales Tax Cases etc.

Reports of the Privy Council, Federal Court and the Supreme Court

The Privy Council was the highest court of appeal from India. Jerom William Knapp compiled the cases from 1829 to 1836 decided by the Privy Council in three volumes covering appeals from India alongwith other cases which were reprinted as the English Reports (E.R.). Later on E.F. Moore did collection of cases decided by the Privy Council form 1836 to 1862 in 15 volumes known as Moore's P.C. covering Indian Appeals as well other cases also which were reprinted as the English Reports. Another series of Moore known as Moore's P.C. (New Series) covering cases decided by the Privy Council from 1862 to 1873 inclusive of Indian Appeals which were reprinted as English Reports. Exclusively Indian Appeals were compiled by E.F. Moore known as Moore's Indian Appeals (M.I.A.) covering from 1836 to 1872 which were reprinted as English Reports. Afterwards the reports known as Indian Appeals (I.A.) from 1872 to 1950 decided by the Privy Council were published annually from England under the

superintendence and control of the Incorporated Council of Law Reporting for England and Wales.

With the establishment of the Federal Court of India under the Government of India Act, 1935 an official series of reports came into picture which is known as the Federal Court Reports. Federal Court Reports were renamed as Supreme Court Reports in 1950 due to replacement of the Federal Curt into the Supreme Court. The Federal Court Journal started publication in 1936 covering decisions of the Privy Council and the various High Courts of India. It was renamed as the Supreme Court Journal in 1950 reporting cases of the Supreme Court. There are other private reports also e.g. All India Reporter (A.I.R.), Madras Law Journal, Supreme Court Cases, Supreme Court Appeals, Supreme Court Weekly Reporter.

Appraisal

Due to official and private reporting of cases at present time has created enormous quantity rather than quality. Repetitiveness, ambiguity, unuseful reporting has resulted wastage of time and money. Official reports are better than private reports if published with sincerity, honesty and regularity along with reasonable price. At present the decision of the Supreme Court is binding on all the subordinate courts under Article 141 as precedent whether it is reported or unreported decision.

CHAPTER – XVII

THE GENTOO CODE

Introduction

The meaning of the word 'Gentoo' remained controversial in the Legal History of India. According to Field's Regulation of Bengal, the origin of the word 'Gentoo' quoted,

"The word 'Gentoo' is derived from the Portuguese word 'Gentio' or a Gentite' which came to mean a 'native of India' i.e. a Hindu".

Sir. E. Hyde East while speaking before the Committee of the House of Lords in 1830 stated–

> "Whether the term 'Gentoo', as used in the Warren Hastings Plan of 1772, was intended to comprehend all other descriptions of Asiatics who happened to be located within the British bound of India, is perhaps very difficult to be told at this time of the day."

According to some other authorities :

> "Hindoo is not the word by which the inhabitants of India originally styled themselves, but according to the idiom of the language' Jamboodepee'; and it is only since the era of the Tartar Governrnent that they have assumed the name of Hindoos, to distinguish themselves from the conquerors, the Muslims."

From above definitions of the origin of the word 'Gentoo', it appears that the word has very ancient roots.

Sometime it denotes 'Hindu' and as per diverse opinions above mentioned it increases its limits.

Noted author namely, Nathaniel Brassey Halhed in his 'Translator's Preface to Gentoo Law' stated –

> "The word 'Gentoo' has been and is still equally mistaken to signify the proper sense of the term as was used by the Professors of the Brahminical religion. In its etymological sense the word 'Gent' or 'Gentoo' means 'animal' and in its more confined sense, mankind _ _ _ _ _ _
> The four great tribes have each their own separate appellation, but they have no common or collective term that comprehends the whole nation under the idea affixed by Europeans to the word 'Gentoo'. Possibly the Portuguese on their first arrival on India, hearing the word frequently in the mouths of the natives as applied to mankind in general, mistook it for the domestic appellation of the Indian themselves, perhaps also their bigotry might force them from the word 'Gentoo' a fanciful allusion to 'Gentile', a Pagan".

A. ORIGIN AND DEVELOPMENT OF GENTOO CODE

In 1772, Warren Hastings produced the executive and judicial plan for the good governance of the Company at Bengal. For the first time, he used this word (i.e. Gentoo) in his above plan; Article 27 of the Plan of 1772 enumerated.

"That in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of Koran with respect to Mohammedans and those of Shastra with respect to 'Gentoo".

Warren Hastings was desirous to Collect the principles and customs of 'Gentoo Religion' (i.e. Hindu Religion). Therefore, he invited few learned Brahmins from every part of the Kingdom at fort William in Calcutta, who were well versed with Shastras, to study the subject in question by reading the ancient and latest books which were also collected at the instance of Warren Hastings. The learned persons thus prepared a 'Code of Gentoo Laws' in Sanskrit language. After some time the code was translated in to Persian language.

Nathaniel Brassey Halhed, a young man who did the courageous job of translation of the code in Persian in to English language in 1775 and the same was published in 1776 in London which was re edited in 1777 and 1781. In is important to note that the Code was also translated in to French language at Paris in 1778. About clarity and purity of the Gentoo Code, Rankin observed:

"The Gentoo Code suffers from the Persian translation being but a loose and inaccurate version of the original."

B. CONTENTS OF NATHANIEL BRASSEY HALHED'S GENTOO CODE :

The Code contained Substantive law and Adjective law as mixed up. It comprised of 21 chapters which were sub divided in to sections and these sections were further divided in to paragraphs. Halhed's scheme of Gentoo Code was as under:

CHAPTERS **SUBJECTS**

Chapter 1. Lending and Borrowing (Sub divisions in 5 Sections)

Chapter 2. The Division of Inheritable Property (Sub divisions in 16 Sections)

Chapter 3. Justic (Sub divisions in 11 Sections)

Chapter 4. Trust or Deposit (1 Section sub divided in to Paragraphs)

Chapter 5. Selling a stranger's property (1 Section divided in to Paragraphs)
Chapter 6. Shares (2 Sections)
Chapter 7. Gift or Alienation by Gift (1 Section)
Chapter 8. Servitude (3 Sections)
Chapter 9. Wage:(Section 1 wages of Servants; Section 2 wages of Dancing girls)
Chapter 10. Rent and Hire (1Section)
Chapter 11. Purchase and Sale (2 Sections)
Chapter 12. Boundaries and Limits (1 section)
Chapter 13. Shares in the Cultivation of Land (1 Section)
Chapter 14. Cities of Towns and the fines for damaging a Crop (1 Section)
Chapter 15. Scandalous and Bitter Expression (2 Sections)
Chapter 16. Assault (3 Sections)
Chapter 17. Theft (6 Sections)
Chapter 18. Violence (1 Section)
Chapter 19. Adultery (8 Sections)
Chapter 20. What concerns women (1 Section)
Chapter 21. Sundry Articles (10 Sections mentioned below) :
Section 1: Of Gambling.
Section2: Finding any thing that was lost
Section 3: The fines for cutting tree
Section 4: Tax upon buying and selling goods
Section 5: Quarrels between father and sons.
Section 6: Serving unclean victuals
Section 7: Punishment on a Soodar for reading Vedas
Section 8: Properties of Punishment
Section 9: Adoption
Section 10: Sundries.

C. DEFECTS IN GENTOO CODE

The Ancient Hindu Criminal law was based on 'Dharam Shastras' under the heading of 'Vyavhara'. The Gentoo Code was defective because it was not the true translation of Hindu Criminal law. Required labour for making a material systematic, pure and clear was not made.

Rankin in his 'Background to Indian Law' opined–

> "The Hindu Criminal law as presented in the 'Gentoo Code' is full of impracticable and absurd directions which can not represent any systematic practice. The Gentoo Code in 1775 represented the notions of a long deed past as regards Criminal Law. It is not easy to see how Hindu Society with its multiplicity of independent Chiefs each exercising power, could very well give rise to a coherent system deserving to be called a Hindu Law of Crime. What is put forward by the text writers as legal rule is often no more than the fanciful suggestion of a Brahmin writer legislating in vacno. A long catena of absurdities could be quoted from the Gentoo Code; in many cases the absurdity consists in a perverted notion of 'making the punishment fit the Crime'; in others in the minute distinctions upon which the tariff of fines in built; in other in the savagery with which the crimes are punished when committed against Brahmins or persons of higher caste than the wrongdoer"

The Ancient Hindu Law was really defective because, the law making agency was not one rather many persons having

diverse opinions about common questions Secondly, the law was badly effected from casteism, where the reading of Vedas by Soodar was punishable (vide section 7 of chapter 21 of Gentoo Code) whereas in the modern era, the government itself solicits the citizens to read and know the laws of the Country and foreign Countries.

Therefore 'Gentoo Code' was mere a collection of relevant or irrelevant, human or inhuman provisions written by self styled chiefs of Hindu society who provided to the society their own whims and likings on the pretext of law.

CHAPTER - XVIII

DEVELOPMENT OF THE LEGAL PROFESSION

Introduction

A. Necessity of Legal Profession

In a report by International Congress of jurists on 'The Rule of Law in a free Society' held in India in 1959 it was observed, "It is essential to the maintenance of the Rule of law that there should be an organized legal profession free to manage its own affairs." It is really true that legal profession is a necessary ingredient and guarantor of the rule of law. The legal Profession appears to have been vague in ancient and medieval period of India. Development of the legal profession can be traced from the beginning of British Rule in India. The present legal profession is the result of gradual developments by Acts, Charters and rules framed in the interim period from 1600 to current year.

B. Regulating Act, 1773 (Legal Profession in Supreme Court):

In pursuance of the above Act, the Supreme Court was established in Calcutta by a Royal charter of 1774. Clause 11 of the Charter of 1774 authorised the Supreme Court, "to approve, admit and Enrol such and so many advocates and attorneys at law" as it thought proper and also to remove them on reasonable cause. No other person was entitled to appear, plead or act in the Supreme Court for or on behalf of any party. With this arrangement, only the English and Irish barristers and members of the faculty of Advocates in Scotland or British attorneys fell within the sphere of clause 11of the charter of 1774.

In later charters establishing Supreme Court at Bombay and Madras, the same provisions were provided at par with the Charter of 1774 Thus Indians were kept out of the legal profession to appear before the Supreme Court of Calcutta, Bombay and Madras. These three Supreme Courts were the Crown's Courts.

C. Bengal Regulation VII of 1793 And XII of 1833

(Legal profession in Company's Courts)

The position of legal profession in Company's Courts Viz Sadar Diwani Adalats and lower courts in mofussil Area was different from the Supreme Courts. Lord Cornwallis by Regulation VII of 1793 empowered the Sadar Diwani Adalat to enrol pleaders for the Company's Courts in Bengal, Bihar and Orissa and further empowered to fix there scale of fee. By this Regulation only Hindus and Muslims could be enrolled as pleaders. Their empowerment was narrated by Regulation XXVII of 1814 as they could act arbiters and give legal opinions only. The next important legislation was the Bengal Regulation of 1833 which empowered the Sadar Diwani Adalat to Enrol any qualified person as pleader without regard to his nationality or religion.

D. The Legal Practitioners Act, 1846 AND 1855

The Act of 1846 made vital changes notably:

(i) All persons if certified by the Sadar Adalats as persons of good character and duly qualified would be pleaders irrespective of his nationality or religion.

(ii) Attorneys and Barristers (of Crown's Courts in India) were made eligible to plead in any of the Sadar Courts.

(iii) The pleaders were allowed to enter into agreement with their clients for their fees. Further the legal Practitioners Act, 1855 permitted the Barristers and

Attorneys (of Crown's Courts) to appear before any of the Courts of the Company (i.e. Sadar Adalats or subordinate Adalats in local Area). But on the other side, the Indian legal practitioners could not appear before the Supreme Courts. Hence, the distinction sustained.

E. The Indian High Courts Act 1861

The Act of 1861 provided for replacement of the Supreme Court and Sadar Adalats by the High Court, accordingly, clause 9 the Letters Patent of 1865 established the High Court at Calcutta and also the Court was empowered to -

"approve admit and enrol such and so many Advocates, Vakils and Attorneys." As it deem fit. They were entitled to appear and plead before the High Court according to rules made by the High Court or directions issued by it. Similar provisions were made in the Chapters establishing the High Courts at Bombay and Madras.

F. The Legal Practitioners Act 1879

The Act was passed to consolidate and amend the law relating to legal practitioners. The Act empowered the Three Chartered High Courts (i.e. at Calcutta, Bombay and Madras) to enrol legal practitioners permitted to practice in the above three High Courts and for different courts (i.e. all company's courts), also take disciplinary proceedings against them. Necessary rules for enrolment and disciplinary proceedings were to be framed by these courts.

The Act of 1879 also empowered all High Courts other than the three Chartered High Courts to make rules, with the prior sanctions of the respective provincial governments with regard to the qualifications and admissions of eligible persons to be the Advocates and Vakils of the courts. Opportunity of

hearing was given to these practitioners in disciplinary proceedings against them.

All the High Courts were empowered to frame rules with regard to qualifications and admission of pleaders and mukhthars for the subordinate courts and revenue offices. Pleaders were law graduates from India and mukhthars were non-law graduates. High Courts were empowered to take disciplinary proceedings against Pleaders and Mukhthars with opportunity of hearing.

As regards nomenclature, 'Advocates' were to be barristers of England or Ireland or members of the Faculty of the Advocates of Scotland. Hence 'Advocates', 'Attorneys' were permitted to practice in High Courts in every matter. 'Vakeels' were also permitted to practice in High Courts in all the matters excepting original side and appeal against original side. Vakeels were Indian law graduates. Advocates or Vakeels on the roll of any High Court could plead in any other High Court with its permission but could plead before any subordinate courts without any permission. Attorney on roll of one High Court had full permission to appear before any High Court without permission and before any subordinate courts.

Section 36 of the Act of 1879 also authorised the District Judges, Session Judges, District Magistrates, Presidency Magistrates, Collectors and the Chief Judges of a presidency small cause court to publish the list of touts, debar them from entering the premises of the courts and even be subjected to fine and imprisonment. At present 'Toutism' is still considered an illegal act but is continue.

G. the Indian Bar Committee, 1923 (The Chamier Committee)

Because the Act of 1879 had resulted into incoherence and lack of uniformity. Also, the distinction between the competence of Advocates and Vakeels caused annoyance and criticism. Moreover, British Barristers and Solicitors were enjoying some privileges. These factors stimulated the demand for an all India Bar which ultimately resulted into the appointment of the Indian Bar Council Committee in 1923 under the chairmanship of Sir Edward Chamier. This Committee was to report on the following issues :

(i) Whether the Bar to be constituted on an All India Basis or provincial basis and its probable structure etc.?

(ii) Whether the distinction can be removed between Advocates or Barristers and Vakeels?

As regards first issue, the Committee reported the impossibility of constitution of an All India Bar rather it recommended the constitution of Bar Council for each High Court, empowered with disciplinary action against the practitioners but after taking the report of enquiry. About second issue, it reported that a single grade of practitioners competent to plead in High Courts be established who would be called 'Advocates'.

H. The Indian Bar Council Act, 1926

With the recommendations of the above Committee headed by Sir Edward Chamier, the Indian Bar Councils Act, 1926 was passed. It provided following developments :

(i) Establishment of a Bar Council, consisting of fifteen members for each High Court. Out of fifteen members, Advocate General was to be ex-officio member. As regards the Chartered High Courts, Advocate General was to be the ex-officio chairman.

(ii) The record of enrolled practitioners was to be maintained by each High Court respectively. The concerned Bar Council, with the sanction of that High Court was empowered to frame rules regulating the admission of Advocates, their qualifications and the fee payable to the Bar Council.

(iii) A Barrister or attorney or a law graduate after some prescribed training could be admitted as an Advocate.

(iv) The application was to be submitted before the Bar Council and final decision was taken by High Court which could refuse admission in its discretion.

(v) Calcutta and Bombay High Courts were vested with reserve power to control admission of Advocates on their original side.

(vi) To remove discrimination on the basis of sex, specific rule to be made by every Bar Council that women will not be disqualified to be an Advocate.

(vii) In disciplinary action, cases against the practitioners, reference by High Court was given to the Bar Council. The Bar Council conducted the proceedings according to the rules made by the High Court and a report was submitted to the High Court for final decision.

The Act of 1926 did not achieve the desired goal. Firstly, because no provision was made with respect to legal practitioners in subordinate courts since it exclusively meant for practitioners in High Courts only. Secondly, the Bar Councils were simply advisory bodies, the real power to approve the rules, admission of practitioners, punishment to practitioners in disciplinary actions was vested with the High Courts. Thirdly, the reserved power of Calcutta and Bombay High Courts regarding admission of practitioners on their

original side. Fourthly, the enrolled practitioner of one High Court was to follow the rules of other High Court in case of intended appearance in the latter.

I. The All India Bar Committee, 1951

The dissatisfaction with the provisions of the Act, 1926 continued to prevail. India got freedom on 15th August, 1947. New thought took place. The Supreme Court of India was established in 1950. The Advocates Act 1951 was passed which provided that every Advocate of the Supreme Court shall have right to practice in any High Court. The legal practitioners were desirous to abolish the class distinction among themselves rather they wanted unified system of Bar Council. Keeping in view of these demands, a committee was appointed by the Government of India in 1951 known as the All India Bar Committee under the chairmanship of Justice S.R. Das to report about the following points:

(i) Possibility of an All India Bar and separate Bar Council for the Supreme Court.

(ii) Abolition of different classes of legal practitioners.

(iii) Abolition of the distinction between counsels and solicitors as existed in Bombay and Calcutta High Courts.

(iv) Unification of the existing laws relating to legal profession.

The All India Bar Committee submitted its report in 1953 suggesting the creation of all India Bar Council with common roll of all Advocates and also the establishment of Bar Councils for States with more autonomy. Yet the Committee did not suggest for separate Bar Council for the Supreme Court because the purpose was to unify the system. It recommended the existence of distinction between counsels and solicitors in

Bombay, and Calcutta High Courts while rest of the classes among practitioner be abolished and common nomenclature of 'Advocate' be used. Only law graduates be enrolled as Advocates.

The above recommendations remained futile as no action was taken on them but later on these recommendations were repeated and endorsed by the Law Commission in its fourteenth report in 1958. With an idea to implement these recommendations a bill was introduced in 1959 which ultimately passed into the Advocates Act 1961.

J. The Advocates Act, 1961

The Advocate Act, 1961 extends to the whole of India, enumerates federal structure of legal profession and consolidates the law relating to legal practitioners, provides one category of the practitioners known as Advocate. It provides State Bar Councils at lower level and a Bar Council of India at upper level.

Establishment of the State Bar Councils

1. An advocate is enrolled with a State Bar Council. Common roll of all Advocates in India is maintained by the Bar Council of India.
2. An advocate cannot be enrolled in more than one Bar Council yet the enrolment can be transferred from one State Bar Council to another. An advocate thus enrolled can appear before any court or tribunal throughout the country.
3. The State Bar Council can be of one State or more than one state or include union territories in State Bar Council. For instance, there is one Bar Council for states of Assam, Manipur, Meghalaya, Nagaland,

Tripura. Punjab and Haryana have one Bar Council. Delhi has a separate Bar Council.

4. A State Bar Council comprised of 15 to 25 members elected from amongst advocates enrolled with that Bar Council. Advocate General of the State and Additional Solicitor-General in case of Delhi are ex-officio members of the council.
5. State Bar Council has its chairman and vice-chairman elected by the Bar Council. The tenure of State Bar Council is 5 years.
6. State Bar Council has Executive Committee, an Enrolment Committee, Disciplinary Committee. It may have Legal Aid Committee or any other committee necessary for the needy purpose.
7. The functions of a State Bar Council are inter-alia :
   (i) to admit persons as Advocates on its roll.
   (ii) To entertain and determine cases of misconduct against Advocates on its roll. In these cases the Bar possesses powers of a civil court. The punishments may be reprimand, suspension or removal from roll.
   (iii) To safeguard the rights, privileges and interests of Advocates on its roll.
   (iv) To promote and support law reforms.
   (v) To conduct seminars, publish legal periodicals.
   (vi) To conduct elections of its members
   (vii) To provide legal aid to the poor.

Establishment of the Bar Council of India

1. The Bar consists of (a) Attorney General of India; (b) The Solicitor-General of India; (c) one member elected

by each State Bar Council from amongst its members. Chairman and vice-chairman are elected in Council.

2. The Council has an Executive Committee, legal education committee. It may constitute other committees if so necessary for carrying out the provisions of the Act.

3. The Council has following functions inter-alia :

(a) to prepare and maintain a common roll of advocates.

(b) To lay down standards of professional conduct and etiquette for advocates.

(c) To lay down the procedure to be followed by the Disciplinary Committee of itself and State Bar Council.

(d) To safeguard the rights, privileges and interests of advocates.

(e) To promote and support law reforms.

(f) To exercise general supervision and control over State Bar Councils.

(g) To promote legal education.

(h) To hear appeals against the decision of State Bar Councils in disciplinary cases in judicial manner.

(i) To give recognition to degree of various Universities and foreign qualification for the purpose of enrolment of Advocates.

(j) To conduct seminars, organise legal aid to the poor programmes, publication of legal journals etc.

The Act has provided an All India Bar with professional autonomy. Standards of legal profession, uniformity of various laws on the subject, common nomenclature of 'Advocate' have been provided by the

Act. Still any Advocate may with his or her consent, be designated a senior advocate if the Supreme Court or a High Court is of the opinion that by virtue of his ability, professional experience and standing at the Bar, he or she deserves such distinction. The Advocate Act, 1961 has granted the vast power and jurisdiction to the Bar Councils which were earlier exercised by the Courts in relation to enrolment, disciplinary proceedings against Advocates etc.

CHAPTER – XIX

HISTORY OF WRIT JURISDICTION

Introduction

Origin of the Writ Process in England

The Court of chancery was the writ office. The writ process was gradually developed on English soil in the twelfth Century out of rough and even shapeless material. Originally the writ was a command of the king in writing to the sheriff addressed to the defendant to appear in the court within the specified period of time. Writs were of two types. First were "writs of Course". As the Complaints of the same kind came again and again before the chancery where dispute involved of individual rights e.g. property right a common form of writ was drawn for them which were called as writs of Course. For instance Writs of Replivin, Debt, Detinue, Covenant, Annuity, Account, Trespass, case, Ejectment, Assumpsit, Trover etc were the writs of course which were issued where disputes were between two or more citizens without involvement of Crown's governance of the Country. Second were the "Prerogative Writs" which had relationship with Crown's sphere of governance for instance breach of law and order or breach of peace. These writs were issued when the dispute involved individual rights of the parties but had concern with Crown also. Hence the writ system was originated and developed for solution of the situation where the common law was either deficient or silent.

Writ System in India (1726 –1860)

By virtue of the charter of 1726 in place of Company's Courts, the Mayor's Courts were established in Calcutta, Bombay and Madras which were considered the King's Courts

as they derived authority from the King of England to solve the disputes among Englishmen who were in the Employment of the Company. The Charter of 1753 revised the Mayor's Courts. Later on by Regulating Act of 1773 the king was authorised to establish a Supreme court of Judicature at Fort William in Bengal in place of the Mayor's Court. Gradually the Supreme Courts were also established at Madras and Bombay. Here study of writ jurisdiction of Supreme Courts is placed turnwise of Calcutta, Madras and Madras.

(i) Writ System in Supreme Court at Calcutta

First time in the history of India writ system was started by the Supreme Court. In pursuance of the Regulating Act 1773, a Royal Charter was issued in 1774 according to which the Supreme Court was established at Calcutta which was vested with the jurisdiction similar to King's Bench in England. Hence the Supreme Court issued the writs of Habeas Corpus, Mandamus, Certiorari, procedendo, error to be directed to all subordinate courts, magistrates or offices.

(ii) Writ System in Supreme Court at Madras and Bombay

In 1800 the Recorder's Court was abolished in Madras, in place of it, the Supreme Court was established by Madras Charter of 1800 in which the provisions of Charter of 1774 were reproduced.

In 1823 the Recorder's court was abolished in Bombay, in place of it, the Supreme Court was established by Bombay Charter of 1823 in which the provisions of character of 1774 were reproduced. Both the Supreme Court of Madras and Bombay exercised the writ jurisdiction similar to the Supreme Court at Calcutta.

Writ System in India (1861–1949)

In pursuance of the Indian High Courts Act 1861, the letters patent were issued by Queen Victoria by virtue of which High Courts in the three Presidency towns of Calcutta, Madras and Bombay were established in place of existing Supreme Courts. These High Courts enjoyed the same writ jurisdiction as was enjoyed by the abolished Supreme Courts. From 1865 to 1947 yet several High Courts were established by the Crown but these High Courts were not given the writ-jurisdiction.

Writ Jurisdiction Under the Constitution of India, 1950

The Indian Constitution empowered the Supreme Court and all the High Courts to issue writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari. The Supreme Court under Article 32 and the High Courts under Article 226 can issue directions or orders or writs for the enforcement of any of the Fundamental Rights as embodied in Part III of the Constitution.

The Supreme Court pointed out in *Daryo* v. *State of U.P.*[1] that an applicant under Article 226, cannot apply on the same grounds under Article 32 without getting the adverse judgement, under Article 226 being the applicability of principle of res-judicata.

The constitutionality of Central law is exclusively within writ jurisdiction of the Supreme Court and of State law is within High Court. Clause (3) of Article 226 lays down that the jurisdiction under Article 226 would not be available if any other remedy for such redress is provided for by or under any other law for the time being in force. Such provision does not find place in Article 32.

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[1] A.I.R. 1961 SC 1957 : 1969 1 SCC 100, 15.

Historical Development of Various Writs

1. Writ of Habeas Corpus

The remedy is available to a person who is confined or detained by any authority or person, to apply in the court whereupon the court may issue an order to produce the detained person before the court. Then the court will come to know the legality of the grounds of detention and if are found illegal the aggrieved person will be set free.

The writ was issued for the first time in the case of R.V. Vaghan by the Supreme Court at Calcutta. Another leading case was of Ameer Khan[2] in which it was held that the High Court's power to issue writ was not confined to the Presidency towns, but extended to the mofussil area as well. This Bengal decision was later on applied by the Madras and Bombay High Courts also.

According to the Code of Criminal Procedure, 1898 under Section 491, the writ of Habeas Corpus was prescribed. This jurisdiction was exclusively enjoyed only by the High Courts of Calcutta, Madras and Bombay and confined to the territorial limits of the respective Presidency towns. The Criminal Procedure Amendment Act, 1923 extended Section 491 to all the High Courts.

The constitution of India 1950 in Articles 32 and 226 empowers the Supreme Court and High Courts to issue the writ of Habeas Corpus. But the Constitution has also restricted the scope of the writ by authorising the legislatures to enact laws curtailing the remedy under Schedule VII[3] for instance the Preventive Detention Act.

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[2] 1870 Beng. L.R. 392.

[3] See Constitution of India, Sch. VII, List I, Entry 9; List III, Entry 3.

2. Writ of Mandamus

"Mandamus" means a command. In its origin it was issued in the King's name directed to any person, corporation or inferior court of judicature requiring them to do something specified therein.

This writ was exercised by the Chartered High Courts of Calcutta, Madras and Bombay but within local limits of their ordinary original civil jurisdiction. The earliest case is *Justices of Peace* v. *Oriental Company* where the writ was issued on Justices of peace who were within Presidency town of Calcutta.

Section of 50 of the Specific Relief Act, 1877 curtailed the jurisdiction of mandamus of all the three Chartered Courts completely. But Section 45 of the same Act of 1877 empowered all the three High Courts to issue orders in the nature of writ of mandamus with a proviso that such order cannot be issued against the Secretary of State, the Central Government, Crown's Representative or any Provincial Government. Hence the Specific Relief Act, 1877 substituted the word 'order' in place of 'mandamus' and its issuance was restricted against some high offices and officials.

Under the Constitution of India, 1950 under its Articles 32 and 226 the Supreme Court and all the High Courts are fully empowered to issue such writ. This writ is issued to compel any public authority including administrative and local bodies to act as desired by the issuing court. The writ is not issued to correct an error or irregularity in the judgement of a court which could be corrected by appeal or revision.

Still the writ of mandamus cannot be issued against (i) The President or the Governor of a State for the exercise and performance of the powers and duties of his office, (ii) Against

the Legislature[4], (iii) Against persons who are not holders of public offices.[5] (iv) Against an inferior or ministerial officer who is obeying the orders of his higher authority[6]

3. Writ of Prohibition

In its origin in England, the main object of the writ was the maintenance of the King's prerogative upon which depended public order in the administration of law.[7] It is issued by a superior court to its subordinate court to refrain from exceeding the limits of the jurisdiction.

If we trace the back history, the writ was issued by the Calcutta High Court in Re National Carbon Company.[8] The same High Court also issued in *Indumati Devi* v. *Bengal Court of Wards.*[9] Bombay High Court also issued the writ in *Ashdown & Co. Ltd.* v. *Chief Revenue Authority, Bombay.*[10]

According to the Constitution of India, 1950 now all the High Courts are empowered to issue such writ. It can be issued by the Supreme Court and High Courts to prohibit any subordinate court, tribunal, judicial or quasi-judicial from exceeding its jurisdiction or in violation of natural justice or in contravention of Fundamental Rights or application of law which is ultra-vires.

4. Writ of Certiorari

The writ in its origin was issued by the superior court to an inferior court requiring the record of the proceedings of a pending case to be transmitted to the superior court to be dealt

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[4] *Chotey Lal* v. *State of U.P.*, A.I.R. 1951 All. 228.

[5] *Laxman* v. *Rajpramukh*, A.I.R. 1953 MB 54.

[6] *Shirur Mutt* v. *Commissioner*, A.I.R. 1952 Mad. 613 (617).

[7] *Worthinglon* v. *Jeffries*, 1875 LR 10 CP 379; Cox v. Mayor of London, (1867) 2 HL 239 (254).

[8] 1934C 725; 61C 450. .

[9] 42CWN 230.

[10] 501A 227; See also *Narayan Vithal* v. *Janki Bai*, 39 Bombay. 604.

with. Viscount Simon, L.C. in the famous case *Ryots of Garbandho* v. *Zamindar of Parlakimedi*[11] observed about the writ–

> "The ancient writ of certiorari in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because in its original Latin form it required that the King should 'be certified' of the proceedings to be investigated and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal should be properly exercised..."

The Calcutta High Court issued the writ in an earliest case of Sagar Dutt but the writ was never issued outside of Calcutta town.

Madras High Court issued the writ in *Pennegonda Venkataraman* v. *Secretary of State for India*[12] in Presidency town of madras as well outside of the town over British subjects or company's servants.

Bombay High Court observed various elements about issuance of the writ in *Juggi Lal Kamlapat* v. *Collector of Bombay.*[13]

According to the Constitution of India, 1950 the Supreme Court under Article 32 and High Courts under Article

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[11] A.I.R. 1943 PC 164 : 70IA 129.
[12] I.L.R. 1929 Mad. 179.
[13] 1946 B. 280 (290).

226 can issue the writ for enforcement of Fundamental Rights. Also the High Courts under Article 226 are empowered to issue the writ for the redress of any injury due to contravention of any enactment or ordinance or order or rule or regulation or bye law committed by any authority. The High Court will enquire into the matter of illegality and can quash the proceedings initiated by the judicial or quasi judicial bodies.

Because both the writs i.e. 'Prohibition' and 'Certiorari' restrain the inferior courts, the distinction lies that Prohibition prevents the inferior court or tribunal from proceeding further in excess of jurisdiction whereas Certiorari serves the dual purpose of prevention and cure after inquiring into the matter. In other words Certiorari requires the record or the order of court to be sent to the superior court to have its legality inquired into and if necessary to have the order quashed.[14] Here superior court means any superior court inclusive or exclusive of the writ issuing court. After pronouncement of final decision by inferior court the writ of prohibition is useless whereas Certiorari still serves the purpose.

5. Writ of Quo-Warranto

In England, the writ in its origin was issued at the instance of the King against any citizen who claimed or usurped any office, francise or privilege of the Crown to enquire from such citizen by what authority he supported his claim. Even the writ was issued against the holder of the office in private institution.

Prior to 1950 only the High Courts of three Presidency towns (Calcutta, Madras, Bombay) were empowered to issue such writ within limits of their original jurisdiction.

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[14] R.V. Electricity Commissioner, (1924) 1KB 171 (204).

According to the Constitution of India 1950 the Supreme Court and the High Courts are empowered to issue the writ under Articles 32 and 226 respectively. The writ issued to the holder of the public office to answer the court under what authority he holds that office. Such public office may be filled up through appointment or election. Here 'office' includes of government or public corporation but excludes any office under private institutions. It is not necessary that the petitioner should have suffered a personal injury. The motives of the appointing officer in making the appointment in question are irrelevant in a quo-warranto petition. Hence the writ can be issued to test the validity of election to a university syndicate or a municipal corporation[15] or appointment of a chief minister or Chief Justice of India or the Advocate General[16] or university teacher etc.

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[15] *Rajender Singh* v. *Shejwalkar*, A.I.R. 1971 MP 248.
[16] *Karkare* v. *T.L. Shevde*, A.I.R. 1952 Nag. 330.

CHAPTER – XX

COURT SYSTEM UNDER THE CONSTITUTION OF INDIA

Introduction

The judicial system provided by the Constitution of India is comprised of three types of courts. At top, it is Supreme Court, at middle the High Courts and at bottom the Subordinate Courts. In addition to the Constitution, there are other laws & rules which direct the composition, powers and jurisdiction of these courts. Here discussion is given of all the three types of courts

THE SUPREME COURT

Chapter IV of Part V of the Constitution provides about the topic. It is the highest court of the land seated at New Delhi, comprised of one Chief Justice and seventeen other judges. Every Judge of the Supreme Court shall be appointed by the President of India. Qualifications to be appointed as judge is that he should be citizen of India, should have been Judge of High Court for at least five years or an advocate of High Court for at least 10 years or is in the opinion of the President a distinguished jurist. The Judge of Supreme Court holds office up to the age of sixty five years unless he resigns earlier or removed on the ground of proved misbehavior and incapacity. The jurisdiction of the Supreme Court is classified as under :

1. Original jurisdiction[1]

The Supreme Court has exclusive original jurisdiction to hear dispute between the Centre and the States or the States

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[1] Article 131, Article 32 of Constitution of India.

interse. Also it has original but not exclusive jurisdiction to enforce Fundament Rights provided under Constitution of India by way of writs.

2. Appellate jurisdiction[2]

It can hear appeal against the decisions of the every High Court on the granting of certificate by the High Court if substantial question as to the interpretation of the Constitution is involved or in a civil case a substantial question of law of general importance involved and the High Court thinks that the question needs the decision of the Supreme Court or in a criminal case is fit one to be heard by the Supreme Court.

The Supreme Court can hear the criminal appeal even without the certificate of High Court against a decision of a High Court in which death sentence has been pronounced after reversing the acquittal order passed by the lower Court or after withdrawal of case from the lower court.

It also enjoys extra ordinary jurisdiction to allow an appeal in any matter against the decision of any court or tribunal by way of special leave[3] petition except the tribunals concerning Armed Forces. The Supreme Court can transfer or withdraw the cases from any High Court.[4] It can review any judgment pronounced or order made by it.[5] The law declared by the Supreme Court is binding on all courts within India.[6] It can make its own rule of governance with the approval of the President.[7] It is a Court of record and has power to punish in contempt of it.

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[2] Article 132, 133 and 136.
[3] Article 136.
[4] Article 139A.
[5] Article 137.
[6] Article 141.
[7] Article 145.

3. Advisory Jurisdiction[8]

The Court can report to the President its opinion about a question of public importance referred to it by the President.

THE HIGH COURTS

Chapter V of part VI of the Constitution contains the provisions regarding the High Courts. Which are discussed here in brief –

1. Establishment

There is to be High Court for each state or one High Court for more than one State. There are the Judicial Commissioner Courts in the Union Territories of Manipur, Goa and Tripura. These courts enjoy the same status as of High Court. The High Court can be established for Union Territories.

2. Court of Record

Each High Court is to be a Court of Record having the powers to punish for contempt of itself.

3. Appointment

The Judges of a High Court are appointed by the President after consulting the Chief Justice of India, the Governor of the State concerned and the Chief Justice of the concerned High Court.

4. Number of Judges

The number of Judges of a High Court is fixed by the President from time to time. In this way, flexibility is maintained with respect to the number of Judges in a High Court which can be settled by the Central Executive keeping in view the quantum of work before the Court.

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[8] Article 143.

5. Qualifications

A person to be eligible for appointment as a High Court Judge must be a citizen of India and must either have held a judicial office in India for 10 years or been an Advocate of a High Court for at least ten years.

6. Tenure

The Judges have a fixed tenure and they retire at the age of sixty two years. They cannot be removed earlier except when the two Houses of Parliament pass an address on the ground of proved misbehaviour or incapacity by a majority of the total membership of each House, and by a majority of not less than two thirds of the members present and voting.

7. Salary

The salaries of the Judges have been prescribed in the Second Schedule to the Constitution and so cannot be varied without a constitutional amendment. The expenses of a High Court are charged upon the Consolidated fund of the State.

8. Conduct Discussion

The conduct of a High Court Judge in the discharge of his duties cannot be discussed in any legislature, Central or State except on a motion for his removal as mentioned above.

9. Concerning Revenue

The antiquated restriction which had been in force since 1915 on the original jurisdiction of the High Courts of Calcutta, Madras and Bombay on their taking cognizance of revenue matters has now been done away with.

10. Writ Jurisdiction

Form the point of view of the writ jurisdiction, the High Courts did not enjoy a co-equal status in the pre-constitutional era. No High Court except, the High Courts of Calcutta,

Madras and Bombay, had any inherent power to issue the prerogative writs. The three High Courts enjoyed this power as inheritors of the jurisdiction of their predecessors. Now every High Court has power to issue various writs under Article 226 of the Indian Constitution.

11. Superintendence

Article 227 which authorises every High Court to have superintendence over all Courts and Tribunals within its territorial jurisdiction.

The High Courts thus occupy a high position of respect, dignity and authority in the Judicial System of India.

SUBORDINATE COURTS

Chapter VI under Part VI of the Constitution provides the provisions regarding subordinate courts. Below the High Court there is the Court of District Judge which is top court among subordinate courts. The appointment, posting and promotion of District Judge is made by the Governor of the concerned State in consultation with the concerned High Court. As regards eligibility for the post of the District Judge, a person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an Advocate or a Pleader and is recommended by the concerned High Court.

Appointments of persons other than District Judges to the judicial service of the State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with concerned State Public Service Commission and with concerned High Court.

As regards control over subordinate courts, including the matters of posting, promotion, leave etc., the concerned High Court is vested with the power to have control over

subordinate courts but the High Court is to exercise the control in accordance with the conditions of service under the law applicable in relation to subordinate courts.

The Governor may by public notification direct the application of the provisions of Chapter VI of the Constitution and the rules made thereunder on any class or classes of magistrates in the concerned State subject to any exception or modification.

PANCHAYATS

Part IV of the Constitution embodies the Directive Principles of State Policy. Under this part, Article 40 lays down that the State shall take steps to organise village Panchayats and endow them such powers and authority as may be necessary to enable them to function as units of self-government. The Panchayats had been discharging judicial functions since ancient time including during British rule. Panchayats are at lowest rung in our judicial system dealing with petty civil and criminal matters through informal and simple procedure with the endeavour to make conciliation or compromise between the parties under disputes. Different State laws had been enacted concerning Nyaya Panchayts having diversities of provisions therein about its composition and powers. The Punjab Gram Panchayat Act 1952 was a State Act. This Act was having two tier system i.e. at lowest level the Gram Panchayats and at upper level the Block Smiti. The same was applicable in Haryana also. Ultimately, the Gram Panchayat Act 1994 (a central Act) was passed applicable on entire country. The Act comprised of three tier system viz., at lowest level there is Gram Panchayats, at medium level there is Block Samitis and at upper level Zila Parishad. The limits of wards from minimum to maximum has

been prescribed for Zila Parishad as 10 - 30, for Block Smiti 10 -30 and for Gram Panchayat 6 - 20. Under this Act all these bodies have been granted some judicial powers in petty matters only.

Appraisal

During British Rule separation of judiciary and executive could not be maintained satisfactorily. This separation has been given proper place in Article 50 of the Constitution which reads as "The State shall take steps to separate the judiciary from the executive in the public services of the State." Therefore a cadre of judicial magistrates was created separate from the executive magistrates eve their functions were separated. The judicial officers have been put under the control and superintendence of the High Courts protecting them from subordination of the executive authorities. Whereas executive magistrates have been kept under the control of the Executive organ of the Government.

PART TWO

CONSTITUTIONAL HISTORY OF INDIA

Introduction

We got a very rich legacy from the ancient Hindu period. A legacy which is more socio-religious than political. The British built a new constitutional structure to suit their political ends in India. The English ideas and institutions ions were gradually introduced by the British in India. Almost all our present constitutional institutions are founded on British constitutional system except that India has a federal form of government with the supremacy of the constitution whereas British have a unitary form of government with the supremacy of Parliament.

Study of 'Constitutional History of India' can be seen mainly under three parts :

A. History of India under East India Company (1600–1858)
B. History of India under the Crown (1858–1947)
C. History of independent India (1947–1950)

Under the above heads, we will study the structural development of the government run by trading company in scattered form in various parts of India, which gradually proceeded in to central governance and ultimately reached the single rule of Crown over whole of India till independence of the Country. Hence the focus will be on the historical development of three institutions viz Executive, Legislature and Judiciary.

A. HISTORY OF INDIA UNDER EAST INDIA COMPANY (1600–1858)

The East India Company was established in 1600 as commercial Company, later on it acquired the government

powers in the Country. Queen Elizabeth granted a charter in 1600 to the company for the purpose of trade in India and East Indies. It empowered the company to "make laws, ordinances etc for good government of the Company and its servants and to punish offences against them by fine or imprisonment according to Laws. Statutes and customs of the realm." James I granted a new charter in 1609 which continued its privileges. The company entered in India at the mercy of the Moghul Emperor Jahanjir in 1612.

Subsequent charters were granted to the Company in 1615,1623 and 1635. In 1661 Charles I granted a new charter to the company. This charter reorganized the Company's structure and authorised the company to appoint Governors and other officers for the proper control and administration of the factories and trading centres. They were also empowered to administer civil and criminal justice with respect to persons employed under them.

(i) Charter of 1726, Regulating Act, 1773 and Act of Settlement, 1781

From 1668 to 1726 various charters were granted to the Company in order to empower the Company. The charter of 1726 reorganized the municipal and judicial institutions at Calcutta Bombay and Madras, At these three Presidency towns, Mayor's Courts were established. The Charter of 1753 reconstituted the Mayor's Court at the three Presidency towns. The Battle of Plassy in 1757 and the Battle of Buxar in 1764 gone rise to serious political consequences. In 1765 the Company became Deewan of Bengal Bihar and Orissa as it was granted by the Mughal Emperor. In 1772 warren Hastings was

transferred from Madras to the Governorship of Calcutta.

British Parliament passed the well known regulating Act in 1773 which provided the appointment of Governor General and council of four members at Calcutta. The governments of Bombay and Madras were made subordinate to the government at Calcutta. It was the beginning of British Parliamentary control over Indian affairs. The Governor General and Council of Bengal was made a supreme Council in India. The supervision of the Company was entrusted to the Ministry in England. The Regulating Act, thus for the first time introduced the idea of the federal system of Government in India. The Act also provided that no rules, ordinances and regulations made by the Governor General in Council will be valid and have enforcing effect until registered in the Supreme Court at Calcutta which was made the authority of approval. The Supreme Court was accordingly established by the Charter of 1774. Hence, the Regulating Act 1773 provided two authorities i.e. Supreme Council and Supreme Court of India, both at Calcutta (also known as Fort William). Act of 1773 can be termed as Constitutional Act in this respect. The Act of 1773 and the Settlement Act of 1781 authorised the Governor General and his Council to make regulations for the territories under the control of the Company. But the Act of Settlement, 1781 removed some conflicting issues which arose due to the defective provisions of the Regulating Act 1773. The Act of 1781 granted immunity to the Governor- General and Council from

the jurisdiction of the Supreme Court, also exempted the judicial officers from its jurisdiction. The Act made very important change that in future, it was not necessary for Governor General in Council to get registered its regulations in Supreme Court for their validity. Yet the copies of regulations were required to be sent to the Court of Directors and the Secretary of State.

(ii) Pitt's India Act, 1784

It made important changes in the administrative system of the Company in India. In India, it reduced the strength of the Councils from four to three and the Governments of Bombay and Madras were made subordinate to the Governor -General in Council of Bengal in administrative affairs. In this way Acts of 1773 and 1781 had provided unification of legislative machinery and this Act had provided unification of administrative machinery in the hands of Governor General in Council at Bengal. In England, the Board of Control was set up under the Pitt's Act, 1784. The power of the Court of Directors in all political and diplomatic matters were transferred to the Board of Control. The system of control continued in England up to 1858. This Board was empowered to "superintend, direct and control all acts, operations and concerns which in any way relate to the civil or military government or revenues of the British possessions in East Indies."

(iii) Act of 1786

The British Parliament with the purpose to accommodate Lord Cornwallis passed the Act of 1786.

It provided that the Governor- General will also be the Commander in Chief of the forces and it enabled the Governor General to over ride his council whenever he considered it necessary. The above powers were given to Governor General because prior to 1786, there were frictions developed during warren Hasting's period. Lord Cornwallis got fame due to his important judicial reforms in Bengal. He introduced the "Permanent Settlement of Bengal."

(iv) The Charter of 1793

The Act of 1793 renewed the trade monopoly of the Company for next period of twenty years. The Act provided that the Governor General of Bengal will supersede the Local Governors whenever he will be either in Bombay or Madras, also authorised to supersede the local Governor as the head of the administration and preside at the meeting of the Council. The Act also required that company's annual statement regarding its affairs in both England and India will be placed before the Parliament in England.

(v) Charter Act of 1831

The Charter renewed the Charter of the Company for another period of twenty years. The Charter Act for the first time asserted the sovereignty of the British Crown over the Indian territories, which laid the two restrictions on the patronage of the Company. Firstly, the appointment of Governor General, Governors and the commander in Chief hence forward required the approval of the Crown, and that of members of the Councils the approval of the President of the Board of Control. Secondly, it was made compulsory for persons

intended to join the Company's service to fulfil the requirement of four term's residence at Hailesbury.

By the time there existed in India three separate legislative bodies to pass regulations for their respective territories i.e. at Bengal, Madras and Bombay. The Charter Act provided the copies of regulations, laws made by the three councils be laid annually before the Parliament in England.

Further, the Act of 1814 had authorised the Governor General in Council and Governor in Council to impose taxes and duties with in their respective Presidency towns. Act of 1823 had established Supreme Court in Bombay in place of Recorder 's Court.

(vi) Charter Act of 1833

The charter Act of 1833 permitted the Company to retain its political and administrative power for the further twenty years i.e. till April 30,1854. The Charter Act imposed a restriction on its commercial activities and Company ceased to be a trading corporation.

The Charter Act made certain sweeping changes in the Constitutional set up of the Company's Government in India, the administration was centralized. Accordingly the Governor General of Bengal was designated as the Governor General of India. The Governors and Councils of the Presidencies of Madras and Bombay were directed to obey all the orders and instructions issued by the Governor General in Council. The Governor General in Council was directed to prepare one budget for whole of the country.

A central legislature i.e. 'All India Legislature' in the hands of Governor-General in Council was established at Calcutta and the legislative powers of the Governments at

Bombay and Madras were withdrawn. The legislations so far enacted to be called 'Regulations' but the legislations to be framed after the Charter Act of 1833 would be called as 'Acts'. The Acts so enacted did not require registration in any court in India but these were to be placed before British Parliament. The British Parliament had in this way superintendence over these enactments. The laws so made by the Governor General in Council were subject to the disallowance by the Court of Directors in England but unless so disallowed they were to have the same force and effect as an Act of British Parliament. In this way controlling power of such legislations was vested with British Parliament and Court of Directors in England.

The All India legislature could make laws and regulations for all persons living in the Company's territories. It was a period of codification also. The First Law Commission was appointed in India under Macaulay to study, collect and codify the various rules and regulations. The Council of Governor General was enlarged by creating a post of Law Member but he had voting power only when the above Council sit for the purposes of making laws whereas he had no voting power in executive matters of the Company.

The Charter Act also provided that no native or natural born subject of the Crown residing in India could 'by reason only of his religion, place of birth, descent, colour or any of them' be disabled from holding any place, office or employment under the Company. This provision of equality was not implemented in practice.

(vii) The Charter Act of 1853

It changed the legislative machinery. The law member of the Governor General's was given a status similar to the other three members of the Council. He was now entitled to sit

and vote at executive meetings also of the Council. The All India Legislative Council was enlarged. Uptil now there were six members viz. the Governor General, the Commander in Chief, three ordinary members and one law member. Now added six more members namely, are Chief Justice, one other Judge of the Supreme Court, and four provincial representative. Thus the Legislative Council was composed of 12 members in all. The quorum was fixed at seven. The bills so passed were required to be assented by the Governor General before becoming an Act.

Archbold stated about the Charter Act of 1853 "represents the beginnings of a Parliamentary system in India." The Charcter Act also appointed Second Law Commission in England to work and give final form to the drafts prepared by the First Law Commission worked in India.

(viii) The Act of 1854

By this Act, the British Parliament empowered the Governor General in Council to appoint special administrative officers in certain areas and to delegate them the necessary powers. Hence these officers were appointed for Assam, Central Provinces, Burma etc. and these officers were called Chief Commissioners.

The position upto 1858 was that the sovereignty over the territories acquired by the East India Company, was vested in the Crown but the territorial possession, their revenues and administration were left in the hands of the Company. Hence, the functions and responsibility were discharged by three bodies viz. the Court of Directors and the Board of Control in England and the Governor-General in India.

B. HISTORY OF INDIA UNDER THE CROWN (1858-1947)

(i) The Government of India Act, 1858

the events of 1857 which are known as first war of Indian Independence or Sepoy Rebellion or Mutiny took place. British Government decided to uproot the evils of the system of double Government which was introduced by the Pit's India Act of 1784 which had created confusion of Constitutional structure. The Act of 1858 transferred the Company's government of India to the Crown and abolished the Company. The Act of 1858 is treated an important landmark in the constitutional history of India.

From 1858 to 1947 was a period of direct government undertaken by the British Government. Few important provisions of the Government of India Act 1858 relating to the constitutional development are as under:-

1. The Act provided that the Company's territories in India shall vest in Her Majesty and the Company shall cease to exercise its power and control over all these territories. India will be governed in the name of the Queen.
2. The property of the East India Company to be transferred to the Crown. All treaties, contracts etc. made by the Company would remain binding on the Crown.
3. The appointment of Governor General of India, Governors of the Presidencies was vested in the Crown. Governor General was empowered to appoint Lieutenant Governors of the Provinces or territories subject to the approbation of Her Majesty.
4. Queen's Principal Secretary of State shall exercise all such powers and perform all such duties as were

exercised by the Court of Directors or Court of Proprietors of the Company. A Council of fifteen members acting as advisory body would assist the above Secretary of State in Indian affairs.

5. Indian Civil Service of the Crown were created under the control of the Principal Secretary of State for India. Therefore, the East India Company's rule came to an end and the direct government by the British Crown was initiated.

(ii) The Indian Council Act, 1861

The Act reconstituted the Executive Council of the Governor General, the number of the members of the Council was raised from four to five, the fifth member being necessary for expert financial advice.

Governor General was empowered to act alone in all matters except law making, also empowered to appoint a President to preside over the meetings of the Council in his absence. The Portfolios or departments were distributed among the members of the Council. According to Lovett–

> "Thus the Government of India became a cabinet Government presided over by a Governor General, business being carried on departmentally and the Governor General taking a more active and particular share in it than is taken by the Prime Minister in a Western country."

The Governor General was also authorised to issue ordinances independently which were to remain in force for six months unless disallowed by the Crown. During this interim period, the Legislative Council was empowered to pass on Act on that subject.

The Act restored the legislative powers of the Provincial Legislatures of Bombay and Madras. These legislatures were authorised to enact laws for the respective provinces and not for subject of national importance. These legislatures were to take sanction of the Governor General and in some cases of the Governor before a Bill was introduced touching some special subjects but in all cases assent of the Governor General was required to give validity to such legislation. Overall above to it the Crown was empowered to disallow such legislation. Important fact to note is that no provision was made for the inclusion of any Indian in these Councils as member.

(iii) The Indian High Courts Act 1861

Company's courts and King's courts were united. At three Presidencies, High Courts were established in place of the existing Supreme Courts, Sadar Diwani and Sadar Nizamat Adalats. By this unification of judicial structure, it became convenient for the legislators to frame uniform procedural laws for both Civil and Criminal cases.

(iv) The Government of India Act, 1870

The Act authorised the Governor General in Council to require from concerned Lieutenant Governor or the Chief Commissioners to submit drafts of Regulations for the less developed areas (known as non-Regulation areas) and thereafter give approval or assent. After such assent, these were to be published in the official Gazette.

(v) The Indian Councils Act of 1892

The Indian National Congress and other patriotic movements emphasised the maximum representation of Indians in the legislatures. With this idea the Act was introduced. The Act increased the number of additional members in all the

legislative councils. As regards Central Legislature working in Calcutta, Governor General was empowered to nominate not less than ten and not more than sixteen additional members and similarly the Governors of Bombay and Madras were empowered to nominate not less than eight and not more than twenty additional members. Some of the nominated members in these legislatures were elected from associations, organisations or local bodies. Hence, the principle of indirect election was introduced and participation of Indians in the legislatures was started. The Act permitted the additional members to discuss, the annual budget and put question of public interest but subject to such conditions and restrictions as were prescribed in the rule made by the Governor General i.e. sixty days notice in advance was required for every question. But they would have no right to voting. Thus it was for the first time that Indians were associated with the highest legislative functions, which was a seed of parliamentarian process or representation of every area in legislation.

(vi) The Minto Morley Reforms, 1909

There was unrest in the country of India regarding insufficient representation of Indians in legislative councils. Lord Morley, then Secretary of State for India, and Lord Minto, the Viceroy of India agreed in principle to introduce major political and constitutional reforms. Lord Minto appointed a committee under Sir Arundale to report on the necessity of reforms. The report was submitted to the Viceroy in October, 1906. The Bill was drafted in the light of all the discussions and negotiations between Morley and Minto. The cabinet approved it and thus the British Parliament passed it in February 1909 known as Act of 1909.

Regarding the Act of 1909, Keith observed, "was the increase of the representative element in the legislative councils and the extension of their powers."

For constitutional point of view following changes were introduced.

1. The members in the Central Legislatures were increased from 16 to a maximum 60. The members in the legislatures of Madras, Bombay, Bengal, U.P. and Eastern Bengal were increased from 20 to a maximum fifty, whereas in Punjab and Burma to thirty.
2. The Legislative Councils constituted under the Act contained three kinds of members. First the members of the Executive Council of the Viceroy or of the Governor who were its ex-officio members, Second, nominated non official members and Third elected representatives of the people.
3. There was majority of non-elected members in Councils. Scheme was also made for indirect elections of members for the Councils. These members represented universities, tea plantation, traders, municipalities and Mohammedans. In reality, only dominant groups particularly lawyers got entry into them. Secondly, Mohammedans were treated as class in India rather citizen of India which was a wrong signal for unity of the country.
4. Discussion on all matters was allowed in the Councils but the matters concerning military, political and provincial affairs, relation with foreign countries and Indian States, matters subjudice were excluded from discussion. The president of the legislative council could always disallow a question in the public interest.

5. The Act provided a declaration that an Indian be included in the Governor-General in Council but it remained unimplemented. Although the Secretary of State had admitted two Indians to his council in 1907 and simultaneously the councils at Madras and Bombay had inserted one Indian in each respectively.

The weakness of the Minto-Morley reforms was the introduction of communal electorates for Muslims. According to Jawahar Lalw Nehru, "a political barrier was created round them from the rest of India and revising the unifying and amalgamating process." Hence the national unity got loss, the seeds of strife and communalism were sown which ultimately resulted into formation of Pakistan in 1947.

The Minto Morley reform remained failure in solution to the Indian political problem. There were strong feelings of 'Swaraj' or Self government, the declaration initiated by Lokmanya Tilak in the words "Swaraj is our birth-right and we shall have it."

(vii) The Government of India Act 1919

George V the King of England came to India for the first time in history for Delhi Durbar in 1911. In his announcement, the capital was transferred from Calcutta to Delhi. It was also realised that just demands of Indians for a large share in the government of their country would be fulfilled in the course of time. First World War changed the outlook of English people relating to constitutional reforms in India as Britain was in need of co-operation, money, man power and army.

E.D. Montague, Secretary of State for India in his historic pronouncement before the House of Commons

declared the future policy of the British Government in India on August 20, 1917. He said :

> "The Policy of His Majesty's Government, with which the Government of India are in complete accord, is that of increasing association of Indians in every branch of the administration, and the gradual development of self governing institutions with a view to the progressive realisation of responsible Government in India as an integral part of the British Empire. The progress in this policy can only be achieved by successive stages. The British Government and the Government of India must be the judges of the time and measures of each advance."

In November, 1917, Montague came to India, discussed with top ranking leaders. With the consultation of Viceroy, Lord Chelmsford, Montague prepared the report on Indian Constitutional Reforms which is known as "Montford Scheme" or Montague -Chelmsford Report for India. Later on the Government of India Bill was drafted on the basis of above scheme, which became an Act in 1919.

Following were the main provisions of the Act of 1919 :

1. Preamble : British India would remain an integral part of the British Empire; the aim of the British Government is to install responsible Government of India; for self government, it is necessary to have more association of Indians in every branch of administration.

2. Central Executive : The superintendence, direction and control of the government of India was vested in the Governor - General in Council (known as India Council). It was to consist of not less than 8 and not more than 12 members. Their

term of office was fixed at five years at a fixed salary. The number of Indians in it was fixed as three. The Act also provided for the appointment of a High Commissioner for India who was to discharge 'Agency functions' distinguished from political functions.

As regards three Indians above stated, substantial representation was given to the members of the Indian Civil service in the Executive Council and this practice continued till 1947. The Members of the Viceroy's Council were to be appointed by the King on the recommendation of the Secretary of the State for a tenure of 5 years. The Act further laid down the powers and relations between the Secretary of State and the Governor General.

Governor General had unique power to overrule the decisions of the Executive Council. He was also empowered to issue ordinances if it become necessary.

3. Central Legislature : The Legislature called as 'The Indian Legislature' comprised of the Governor General and two Houses namely, the Council of States (Upper Hosue) and the Legislative Assembly (Lower House). Prior to Act of 1919 there was one House only. The Council of States consisted of 60 members whereas the Legislative Assembly consisted of 145 members. In both Houses members were to be elected or nominated in accordance with the rules to be made in this respect. The total number of members in both houses was 205. The elected seats were distributed on the basis of communities and interests. Accordingly Landlords, depressed classes, Muslims, Anglo Indians etc. various classes were given representation. The franchise was direct but it was limited on the basis of the payment of income tax and Municipal tax etc.

The members were at liberty to put questions of public importance, to move motions for adjustment of the house.

As regards Supremacy of the Governor General, he was empowered to prevent either house from passing, discussing or permitting introduction of a bills clause or amendment, if in his opinion would affect the safety or tranquility of any part of British India. As regard very important matters viz. public debt, revenue of India, religions, wage of British subjects, army navy and foreign relations etc, the bill could not be introduced without the previous sanction of Governor General. But the Indian legislature (Both Houses) had no power to alter or amend the Government of India Act 1919 or any other Act passed by the British Parliament for India.

The Act of 1919 also provided for formation of joint committees, joint conference and joint sitting of the Houses. Every Bill required to be assented by Governor General before it became an Act. Further, he could reserve the Bill for His Majesty's assent. The term of the council of states was 5 years and of legislative assembly 3 years subject to early dissolution or further extension by Governor General.

4. Provincial Executive : The Dyarchy :- The new system of " Dyarchy" was established with an idea of provincial autonomy. Dyarchy or duel government was introduced in the provinces. The subjects of administration were divided in to two lists i e. The central and the provincial. The provincial lists was further catagorised into two. The Reserved and the Transferred subjects. The subjects under Reserved category were of greater importance viz. : administration of justice, police, land revenue, administration etc. which were to remain under the control of the Governor who was required to assign them amongst the nominated

members of his council. Whereas the subjects under transferred category which were of less importance viz. local self government, roads, buildings, sanitation, health etc. Which were assigned to those ministers who were appointed by the Governor from the elected members. The Governor himself was empowered to assume charge of any subject of transferred category for the time being. Thus the provinces were to be governed under subject of Reserved category by Governor in Council and under transferred category by Governor acting with Ministers.

5. Provincial legislature : The Act provided one legislature in each province. The total number of members varied from Province to Province. There were a Governor's Provinces such as Bengal, Bombay, Madras, Bihar, Orissa, U. P., C. P., The Punjab Assam and Burma.

Provincial legislatures known as legislative councils, composed of the members of executive council and such other elected or nominated members as provided by the Act. As regards supremacy of the Governor any legislation rejected by the legislature would be passed by the Governor if the subject related to reserved category.

The system of election in the Legislative Councils was direct. Voters were Classified on the basis of communities, classes and interest. Due to the system of direct election, the primary voters elected the members. For executive, the Governor was to appoint Indian Ministers from among the elected members of the said legislature.

The term of Legislative Councils was 3 years subject to early dissolution by Governor. The bill passed needed assent of the Governor for making the bill a law. The Governor, in any case could reserve a bill for consideration of Governor,

General. An Act assented by the Governor and Governor General could be disallowed by the king as per provisions of the Act of 1919.

The Montford reforms failed to achieve the goal due to many reasons mainly due to conflicts taken place on the issue of Transferred and Reserved categories, the ministers remained handicapped in the execution of their policies for want of sufficient financial aid (being the 'finance' was exclusively in the grip of Governor in Council), the Governor and his nominated Ministers were very powerful.

(viii) The Simon Commission Report (1930) The Commission consisted of seven members under the chairmanship of Sir John Simon who came in India in February 1928 to inquire the working system of Government. He submitted his report on 24th June, 1930. The Commission recommended that dyarchy system be abolished in the Provinces; Communal electorate must be continued ; Central Legislative Assembly should be called "Federal Assembly". But the Simon Report was shelved and not considered, but some suggestions were taken into consideration while passing the Act of 1935.

(ix) Motilal Nehru Report (1928) All Parties conference held in Delhi in 1928 and a small committee consisting of Pt. Motilal Nehru as its chairman, was set up to draft a constitution for India. The important feature of the draft were namely the demand for a federal and responsible government; the constitution was to be secular and the principle of communal electorate was to be dispensed with ; recommendation of dominion status as the next immediate step and not as a final goal. Ultimately, the British Government did not fulfill its promise and the report was not accepted.

(x) Proclamation by Lord Irwin (1929) Wedgwood Benn, who was secretary of state for India discussed with Lord Irwin, Viceroy of India about Indian affairs. Later on Lord Irwin issued a proclamation on behalf of His Majesty's Government on 31st October, 1929 as–

> "....I am authorised on behalf of His Majesty's Government to state clearly that in their Judgement, it is implicit in the declaration of 1917 that the natural issue of India's constitutional progress, as there contemplated, is the attainment of dominion status."

In its proclamation 'dominion status' was emphasised which created hope in the minds of Indian leaders. From 1930 to 1935, the period was full of changes, developments and activities. "National Movement" was in high spirit. The events took place like the first Round table conference, Civil Disobedience Movement, Gandhi Irwin pact, the Second Round table conference, Local Civil Disobedience, Mahatma Gandini's fast, the Poona pact, the Third Round Table Conference which ultimately compelled the British Government to think about the constitutional structure suited to the need of the time. In these Backgrounds the Government of India Act 1935 was passed by the British Parliament which got assent on August 2, 1935.

(xi) The Government of India Act, 1935

The Act is regarded as important milestone in shaping the modern constitution of India. The Act accommodated diverse forces, namely Indian nationalism British imperialism, communalism and Indian princes. The Act introduced an All India Federation with establishment of provincial autonomy.

Basic features of the Federation

1. All the units existing in the country were divided in to two parts viz., the Governor's Provinces and the Indian States. The Governor's Provinces were bound to be the members of the federation whereas Indian States were at liberty to become such members. Execution of an instrument of Accession was necessary to be a member.

2. The Governor's Provinces were to enjoy uniform Constitutional Status whereas the Indian States were to be governed by the terms of the instrument of Accession. There were approximately 600 Indian States at that time, therefore there were huge number of Constitutional documents i.e. Instruments of Accession.

3. The viceroy was to act as representative of the crown to perform all functions in India.

4. Division to legislative power between the centre and the Provinces maintained under three lists namely. Federal List, Provincial List and the concurrent list. As regards subjects of concurrent list, both the Federal legislature and the Provincial legislatures were empowered to pass laws with supremacy of federal legislature.

5. The federal legislatures was to be bicameral, composed of the Federal Assembly (Lower House) and the Council of States (upper House). The Indian States and the Provinces were separately allotted seats in the Federal Assembly and the Council of States. The members from States were to be nominated by the rulers while the representative from British India were to be elected. Communal representation in election was provided.

6. The Act of 1935 provided dyarchy at the centre and the dyarchy which was provided in provinces according to the Act of 1919 was abolished.

7. The Act provided the abolition of the Indian council of the Secretary of State.

Federal Government (Structure)

(A) Federal Executive: Under the Act, a kind of Dyarchy was established at the centre. The executive was consisted of the Governor-General and a council of Ministers. Generally, the Governor General had to act on the advice of the Council of Ministers except some matters which were either left to his discretion such as external affairs, ecclesiastical affairs, defence, administration of tribal areas or matters which were in his special responsibility. He could appoint three councillors for the exercise of his discretionary functions. In case of constitutional break down he could assume all or any powers vested in the Federal authorities.

The Governor General was discharging his duties in two distinct capacities; for the Governor's provinces, he was the Governor General and for Indian States, he was the Crown's Representative.

(B) Federal Legislature

It was composed of the Governor General (a representative of the British king), council of States and the Legislative Assembly. In the council of States, representation of 156 members was provided from British India and of 104 members from Indian States. In the Legislative Assembly, 250 representatives from British India were provided and not more than 125 nominated representatives from Indian States were permitted. The election was provided on communal basis and

the method was proportional representation with single transferable vote.

The tenure of 5 years was given to Federal Assembly. The Council of States being a permanent house of which one third members were to retire after every three years. The power of early dissolution of legislative Assembly was also vested with the Governor General and veto power, regarding legislation also vested in him.

On certain subjects affecting the sovereign or the Royal family, the federal or Provincial legislature were not authorised to legislate. The Governor General could summon a joint sitting of the two Houses of the Federal Legislature. The Governor General was empowered to assent the Bill but he had right to veto also by which he could sent back for reconsideration to the houses. He was empowered to enact Governor General's Act and promulgate ordinances in its wide discretionary powers.

(C) Federal Court

By the Act of 1935, a Federal Court was set up at Delhi. The Federal Court consisted of chief Justice and not more than 6 Judges who were appointed by a warrant issued under the Royal sign Manual. They were to held office up to the age of 65 years. The Judges could be removed on recommendation of the Judicial Committee of the Privacy Council on the grounds of misbehavior, infirmity of mind or body if a reference to the effect was moved by His Majesty. Thus removal power was vested in His Majesty. A person could be appointed a judge in the Federal Court if he had been a Judge of a High Court for 5 years or had been pleader in an Indian High Court for 10 years or a barrister for 10 years.

The Federal Court had original, appellate and advisory jurisdictions. It had exclusive original jurisdiction to decide disputes between the Federation and the units or between unit and units or with regard to the interpretation of the Constitution or regarding existence of legal rights. In all matters under original jurisdictions, the court issued only declaratory decrees. Federal Court acted as court of appeal against the Judgement of a High Court if the High Court certified that the case involved the interpretation of the constitution or of any order in Council made there under. Federal Court also had advisory jurisdiction, accordingly the Governor General court seek its advice on any question of Law of public importance. The Privy Council was empowered to act as court of appeal against the decisions of the Federal Court in all matters without leave, decided in its original jurisdiction but in any other matter leave of the Privy Council or of the Federal Court was necessary.

Provincial Government (Structure)

In 11 (eleven) Governor's Provinces the then existing, the composition of government was as under.

(a) Provincial Executive

The Executive comprised of the Governor and his council of Minister. The Governor was to act upon the advice of his minister except in some subjects reserved for Governors where no advice was sought from Ministers or in some subjects of special responsibility of the Governor where he was not bound by the Ministerial advice. In the eventuality of Constitutional breakdown in the province, he could by proclamation assume all powers vested in any provincial body or authority except the powers of High Court.

(b) Provincial Legislature

This legislature was called as legislative Assembly. In some provinces there were bicameral legislatures and in others unicameral. Bicameral Legislatures were in six provinces whereas unicameral legislatures were in five provinces. Wherever Bicameral (i.e. two Houses) legislatures were functioning, the upper House was called as legislative council and the lower House was called as Legislative Assembly. Members of the Legislative Council were provided to be elected by the General constituencies, Assemblies and some of them were nominated by the Governor. Being the council a permanent house, therefore one third of its members being renewed after every three years.

As provided by the Act, members of the legislative Assembly were directly elected by the people on the communal basis and through numerous bodies and associations. The tenure of 5 years was given to the Assembly. The economic and educational qualifications were the basis of right to vote, therefore out of total population, only approximately 14% peoples had such right to franchise.

Defective Working of the Act of 1935

There were many defects in the Act of 1935 namely, Indians were not given control over the Government of India ; Indian States were given option to join or not to join the federation ; Indirect elections to the federal assembly were opposed ; communal basis of representation.

Practically, as regards central Government, the Act never came into operation whereas provinces were concerned, the Act came into force in April, 1937. For Provincial legislatures, elections were held in 1937 in which Congress secured majority. The Congress ministries remained in

function till the end of 1939 when the World War II took place. Due to unilateral declaration of the British Government (without consultation of Indian leaders) that India was at war against Germany annoyed these ministers. Consequently the ministers resigned and the provincial administration was taken up by the Governors of the respective provinces.

In 1940, the Muslim League passed Pakistan Resolution at Lahore, demanding a separate sovereign Muslim State. British Govt. sent Sir Stafford Cripps to India for settlement of the problem through direct negotiations with political parties, and communities.

(xii) The Cripps Mission Plan (1942)

Sir Stafford Cripps reached India on March 22, 1942 and submitted proposals for due consideration of all the political parties. The proposals were namely, Indian Union Should be made an independent Dominion in the British Commonwealth; elected body to frame a new Constitution for Indian in which participation should also be of Indian States; till the framing of the new Constitution, the British Government would have the responsibility and would retain the control and direction of the defence of India.

Congress partially accepted this proposal but Muslim League totally rejected the proposal. In August 18, 1942, the All India Congress Committee passed the well known 'Quite India' resolution against British Government.

(xiii) The Wavell Plan (1945)

Lord Wavell, the Governor General and Viceroy of India gave a radio broadcast speech on June 14, 1945 to the people of India, "to ease the present political situation and to advance India towards her goal of full self government". Later on a conference took place at Simla in that year and Lord

Wavell proposed to make his Executive Council purely of Indian councillors except the viceroy and the Commander in Chief. Lastly no agreement took place and hence proposal failed.

(xiv) The Cabinet Mission Plan (1946)

The British Cabinet mission consisting of Lord Patrik Lawrence, the Secretary of State, A. V. Alexander and Sir Stafford Cripps reached Delhi on March 24, 1946. The Cabinet Mission after discussion with various leaders suggested its own formula for solving the constitutional conflict on May 16, 1946. The mission was not in favour of the formation of Pakistan as desired by the Muslim league. The Mission" recommendations were

(i) The There should be a Union of India consisting of both British India and the Indian States

(ii) The Union should have an Executive and legislature consisted of British Indian and Indian States representatives.

(iii) To frame a constitution, it suggested for a Constituent Assembly of 389 members.

(iv) The Provincial representatives from British India were to be sent in the proportion of one member to every one million of population.

(v) The seats allotted to every province were to be divided among its different communities in proportion to their population.

(vi) British Govt. would implement the constitution drawn by the Constituent Assembly which should sit in New Delhi.

(vii) Constituent Assembly's members from the Provinces would be separated into three following sections.

Section-A Madras, Bombay, U.P., Bihar & Orissa

Section-B Punjab, N. W. F. P. and Sind.

Section-C Bengal and Assam

Each of these sections would frame constitutions for the provinces included in each section respectively. After preparation of different drafts of constitutions for various section, the representatives of the three sections and of the State would sit together to settle the Union constitution. The proposal was almost accepted by all the parties except some reservations but Muslim league was adamant on its demand of sovereign Pakistan. Which resulted ultimately failure of the proposals of the Cabinet Mission.

C. HISTORY OF INDEPENDENT INDIA (1947-1950) :

1. The Mountbatten Plan (1947)

Lord Mountbatten succeeded Lord Wavell in India on March 24, 1947. Lord Mountbatten's Plan of June 3, 1947 as accepted by the Muslim League and All India Congress Committee provided following proposals:

(i) Partition was the only solution to solve the problem of India.

(ii) The Constituent Assembly was to be divided into two territorial divisions and the members representing the divided territory would join their respective Constituent Assemblies for India and Pakistan. The territorial boundaries of the divided provinces were to be finally fixed by a judicial commission. Thus final and detailed shape was given to the plan of Mountbatten by passing the Indian Independence Act 1947 by British Parliament.

2. The Indian Independence Act, 1947

The Act was enacted basically on the plan of Mountbattan and got assent on July 18, 1947. The provisions were :

(i) Partition of India to be effected and the establishment of two dominions of India and Pakistan from the appointed day i.e. August 15, 1947.

(ii) British Government would have no control over the Affairs of the Dominions after August 15, 1947.

(iii) Till the new constitution for each Dominion comes into final shape, each of the Dominions and all the concerned Provinces were to be governed in accordance with the Government of India Act 1935. It could be modified according to the suitability.

(iv) For each Dominion, there would be a Governor General appointed by the King. Yet one person could act for both in a dual capacity.

(v) The Governor General would be empowered to give assent in the name of His Majesty to any draft making law. Laws could be framed freely even inconsistent with laws of England.

(vi) All treaties, agreements and functions exercisable by His Majesty with regard to States and their Rules were to come to an end from August 15, 1947.

(vii) The office of the Secretary of State for India would be abolished and in its place secretary of state for commonwealth will act.

(viii) The Indian States will be free to accede to either of the two Dominions.

(ix) The powers of Dominion Legislature was to be exercised by their respective constituent Assemblies.

(x) The Governor General could make such provisions for the effective operation of this Act as seem to him necessary or expedient.

On August 15, 1947 there was end of the British Rule in India. Lord Mountbatten was sworn in as the first Governor General of free India.

The Indian Independence Act, 1947 is a very important landmark in the Constitutional history of India. The Constituent Assembly started to draft the Constitution of India in accordance with 'Objective Resolution'. The resolution intended to establish a federal, sovereign democratic republic in India with safeguards to the freedom of all citizens including minorities such ambition resembles from preamble of the Modern Constitution. Dr. B. R. Ambedkar was appointed chairman of the drafting committee. Sh. B. N. Rau was appointed constitutional advisor. The Draft constitution consisted of 315 Article and 13 Schedules. Constitution of India was enacted and adopted on November 26, 1949 whereas it came into force on the Republic day i.e. on January 26, 1950.

PART-THREE

ASPECTS, SOURCES, RULE OF LAW AND INDIAN LEGAL SYSTEM

1. ASPECTS OF LAW (CONCEPT OF LAW, LAW AND MORALS)

There are many aspects of law. Under the heading ASPECTS, we will discuss only 1. Concept of law and 2. Law and morals herewith :

(a) CONCEPT OF LAW

Introduction

To define 'Law' is not single line answer rather it is the product of legal system. Whereas legal system is a discipline to maintain the law and order in a society. Hence, from primitive to modern society there had been a legal system. The implementing force might got its source from the general will of the people or the ruler or the religion or the Government. Uncommon provisions of the law among various societies is the natural result of diversities of thoughts of these societies due to their different educational, social, economical, religious standards. Synonym word of 'Law' is 'Dharma' in Hindu system, 'Hukum' in Islamic system, 'Droit' in French, 'Richt' in German, 'Jus' in Roman system. Various Schools in jurisprudence define the law with different angles; one School tells about nature of law whereas other Schools are concentrated on purpose, sources, effects of law etc. The definition of law which seems accurate today may become inaccurate tomorrow due to continuing developments in various fields of society.

The basis of the 'Law' had been religion, ethics, morals or social good etc., according to the approach in our ancient

scriptures while explaining relationship between Dharma and Rajdharma.[1]

Judge made law has much importance when deficiency is realised of the formal law upon a problem in hand. Concept of 'basic structure' was developed by the Supreme Court of India with the view that no constitutional amendment can destroy this valuable area in the Constitution of India.[2]

As regards the definition of law Prof. B.N. Tripathi said, "To explain a thing is easier than to define it"[3] whereas Professor M.P. Singh has rightly pointed out "the confusion is inherent in the very question : 'what is law'?"[4] Keeton felt that single definition of law is impossible because the concept is complicated.

Keeton[5] said –

"To attempt to establish a single satisfactory definition of law is to seek to confine jurisprudence within a straight jacket from which it is continually striving to escape." Hart was also of the view that to define law is not so easy and clear. Hart opined –

"Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question "What is Law"?[6]

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[1] R. Lingat, The Classical Law of India (1973).

[2] *Kesavananda Bharti* v. *State of Kerala*, A.I.R. 1973 SC 1461; Also see *Smt. Indra Nehru Gandhi* v. *Raj Narain*, AIR 1975 SC 2299; *Minerva Mills Ltd.* v. *U.O.I.*, AIR 1980 SC 1789

[3] B.N. Tripathi, An Introduction to Jurisprudence & Legal Theory, 5th ed., 1975.

[4] M.P.Singh, Outlines of Indian Legal and Constitutional History, Second Reprint, 1993.

[5] Keeton, "Elementary Principles of Jurisprudence."

[6] Hart H.L.A., The Concept of Law (1961) P.1.

There are other thinkers who see the concept of Law with different angles.

Lloyd defined the law –

"The requirements of a 'good' definition of law should therefore (a) include what is generally accepted as properly within this sphere; (b) exclude which is universally regarded as not being "law" (e.g., the rules of a robber band); and (c) include or exclude borderline case in the light of a reasoned comparison of the phenomena in question.[7]

Paton also expressed his view and emphasised the will of the community in a law including of its binding character. According to Paton –

> "Law may shortly be described in terms of a legal order tacitly or formally accepted by a community. It consists of the body of rules which are seen to operate as binding rules in that community, backed by some mechanism accepted by the community by means of which sufficient compliance with the rules may be secured to enable the system or set of rules to continue to be seen as binding in nature."[8]

Many jurists have defined 'law' but here we shall discuss some important definitions and aspects under these heads :

A. Idealistic Definition of Law

Roman and other ancient jurists focussed on idealism. Justinian Digest defined the law as "the standard of what is just and unjust". Cicero also defined as "the highest reason implanted in nature." Ulpian observed the law as "the art or

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[7] L. Lloyd, Introduction to Jurisprudence, 46 (4th ed., 1979).

[8] G.W. Paton, Jurisprudence, 93 (3rd ed. 1964).

science of what is equitable and good". These definitions defined the law as an instrument of 'justice'.

According to ancient Hindu system, Law was embodied in 'Dharma'. Law was derived from God by way of Shruti (i.e. listening). It means saints listened what the God said. In Dharma, way of life was suggested alongwith provisions of punishment in case of wrong committed against Dharma (i.e. religion). Under this system also the element of 'justice' had been present.

Salmond terms the law as the body of principles recognised and applied by the State in the administration of justice. Here he defines the law in terms of its purpose. But jurist Vinogradoff criticised this definition on the basis that Salmond's view defines the law as an action of the judges where the purpose may be justice or injustice but mere imposition of some principles as are existed in formal form. But if we analyse the definition of Salmond with minute observation the element of justice is still not denied because even in purpose of injustice which it appears may be justifiable to the law makers (i.e. the rulers).

B. Positivistic Definition of Law

Austin defined the law -

"Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject". In brief he said law is the 'command of Sovereign'. In other words he propounded the three elements of law viz. command, duty and sanction. He named this law as 'positive law' distinct from positive morality. Austin is a jurist under Analytical School of Jurisprudence. Kelsen was also a positivistic jurist. According to him law is 'depsychologized command.' Here he differs from Austin as regards to the meaning of 'command' as he

refers the command as imposition of a duty. Kelsen advocated 'Pure theory of law'. Thus under the positivistic approach violation of law is considered objectionable hence law is not mere morality or a suggestion rather a principle to be obeyed. He further said law is a 'normative science'. Every norm (i.e. rule) gets its force from initial norm (i.e. Grundnorm). Hence in this hierarchy all inferior norms derive their force ultimately from Grundnorm. Grundnorm is the starting thought in a legal system. For instance Constitution of India is Grundnorm because laws consistent with it are implemented and contrary to it are declared by the court as unconstitutional or void. Kelsen is a jurist under the school of Pure Theory of Law.

C. Sociological Definition of Law

Under this approach law is defined in terms of its relation with the society. Duguit calls 'social solidarity' (i.e. interdependence of men) as compelling factor of social life. He said law is not the will of the Sovereign rather it is the popular acceptance of the society. It is the essential requirement of the community life. The sovereign is below to law. Another jurist of sociological approach is Ihering. He defined law as "the form of the guarantee of the conditions of life of society, assured by State's power of constraint'. In this definition law serves social purpose and it has compulsorily obedience assured by the State. Eugen Ehrlich defined law –

"At present as well as at any other time the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself." In other words he was of the view that law is found in social facts of a particular community.

Roscoe Pound defined law –

"…. as a social institution to satisfy social wants the claims and demands involved in the existence of civilized society". He advocated the theory of "social engineering". It means a balance between the competing interests in society. In other words, the purpose of law is to maintain balance among the competing interests of the citizens in a society. Pound is the jurist under the sociological school of jurisprudence.

D. Realistic definition of law

Realistic approach is a part of sociological approach. Realistic approach focuses on a scientific observation of law, it observes the law in reality or in actual working. This approach says decisions are affected by the nature of Judges and Advocates, thus human factor is emphasized which includes role of honesty, bribery, corruption, personal interest etc.

Gray[9] defined law –

"What the judges declare." It means law is what the decision is. Hence personal views of Judges are given importance.

O.W. Holmes also defined the law –

"The prophesies of what the courts, will do in fact, and nothing more pretentious, are what I mean by the law."

Appraisal

From the above discussion it appears that multiaspects intermingled with each others are necessary to be understood to define the law. No single definition suffices the purpose. In brief following features or elements draw the boundaries of law:

1. Law needs not necessarily the existence of any State because in primitive society there was law.

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[9] Gray, "nature and Sources of Law".

Paton says "a mature system of law normally sets up that type of legal order known as the state, but we cannot say a priori that without the state no law can exist."[10]

2. Law may derive support from general public (i.e. society) or may be against the will of general public e.g. Prohibition of Sati Tradition (Sati Pratha), ban on smoking, Dowry Prohibition, etc.
3. Law should have sanction (i.e. force) behind it for its implementation.
4. Law have some purpose may be social, religious, educational etc. including dictatorial will of the sovereign which may be disliked by the general will e.g. payment of Income Tax, water tax, electricity charges, fares, etc. Law regulates the conduct i.e. to do some act or not to do.
5. Law has its source of emergence and some agency which implements it as it is backed by sanction.
6. Law is a changing phenomena. Law is needed for new fields of today e.g. pollution, consumer protection, free legal aid, right to know, unemployment allowance multi national companies, cyber laws etc.
7. Law differs from Society to Society. A legal right in one country may be an offence in other country, e.g. marriage between same sex.
8. Law embodies a direction which is compulsorily to be obeyed and violation of which is objectionable.
9. Law can be local i.e. for particular area in a State. Law can be different of different states in one country but cannot be contrary to Grundnorm (i.e. initial source of

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[10] G.W. Paton, Jurisprudence, 93 (3rd ed., 1964).

any legal system) applicable in a particular country or a particular place. Also Religious Laws can be different viz., Hindu Law Mohammedan Law but cannot be contrary to the Grundnorm.

10. Law can be operative over all world such as International Law.

(b) LAW AND MORALS

Introduction

In ancient times, there was no distinction between Law and Morals. Under ancient Hindu Law, the prime source of law is 'Shruti', 'Smriti', 'Vedas' etc. where there is no dividing line between the two. But afterwards 'Mimansa' provided certain principles to distinguish obligatory injunctions and recommendatory injunctions.

The Roman jurists under the heading 'Natural Law' and Greek jurists under the heading 'Natural Rights' have provided morals as basis of the law.

In the 18th century, John Austin adhered his theory according to which law has no concern with morality. He said that law is the command of Sovereign. He also said that jurisprudence covers the study of Law and not of morality. Kelsen also supported this thought. Sociological approach also keeps distinction between law and morals but role of morals in making the law is not denied.

A.L. Harding defined morality –

"All manner of rules, standards, principles, or norms by which men regulate, guide, and control their relationship with themselves and with others."[11]

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[11] A.L. Harding, "Religion, Morality and the Law, 28.

As regards the area of operation of both (i.e. Law and Morals), the morals has wider area as Bentham pointed out –

"Legislation has the same centre with morals but it has not the same circumference".[12]

Acts can be violation of morals as well as law e.g. the offence of murder, theft, kidnapping, rape etc. Simultaneously there can be acts immoral only but not illegal e.g. to take kiss of a beloved on public place, sexual relations between two unmarried adults of opposite sex, to be nude in street or park etc. Act of morality in one country can be immoral and illegal in other country for instance, marriage between same sex is allowed in Britain but not in India.

If we want to know the true circumference of both the concepts i.e. law and morals then it is necessary to know the inter-relation and distinction between these two in the following discussion :

A. Inter-relation Between Law and Morals

Any norm (i.e. rule) which governs human conduct permits the morals to guide the goal. The relation can be observed under these sub points.

(i) Morals as basis of law

As has been mentioned earlier that in ancient times there was no distinction at all between the two rather was considered one and same thing. Hence all the rules or norms originated from morality and sanction behind them was of nature (i.e .supernatural fear) but gradually society turned into State hence sanction came in the hands of Sovereign and these rules or norms were called as laws. Even today law embodies morals as the 'murder', 'attempt to suicide' are acts violative of

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[12] Bentham, "The Theory of Legislation", 36.

both. But the law of vicarious liability is in oppose to the morals as the liability is of he who did not commit the wrong. In other words, liability for the act of another is against morals.

(ii) Morals as purpose of law

Many jurists are of the view that the aim of law is to secure justice. Justice is based on morals. Hence law is means to an end. Here end means betterment, welfare of human beings. Under the Indian Constitution such morals are provided in Preamble of it as justice, liberty, equality, fraternity etc. which are to be achieved and ensured.

Whenever law is enacted, always there has been some necessity of enacting it. Why there is necessity because there is some problem. Morality requires that there should not be any problem to any one. Hence the enacted law is tested on the criteria of satisfaction of the purpose for which the law was enacted. Thus law should confirm to morals.

Even in modern times the law becomes perfect only if it achieves justice or in other words morality. Still the criteria is of purpose.

B. Distinction Between Law and Morals

In the modern times the clear distinction is drawn between these two. Austin's view that law is command of Sovereign clearly indicates that law is to take birth not from the lap of morality rather from the will of the Sovereign or Ruler or Government.

Morals are concerned with behaviour of individuals whereas law regulates the society as a whole. Morals are always good whereas law is to achieve this end.

Morals are pre-accepted concepts by the society while law is imposed irrespective of its acceptance by the society, for instance when encroachments are removed from the streets, the

residents of locality may not like such a law still it has enforcing element.

Morals have more universal character because they remains stable or unchanged but law changes frequently.

Morals are to serve the purpose of goodness whereas law is to secure purpose undertaken by the law makers. It may be good or bad.

Marriage with same sex can be moral and legal in Britain but in India, it is immoral and illegal.

Roscoe Pund said[13] –

> "As to application of moral principles and legal precepts respectively, it is said that moral principles are of individual and relative application; they must be applied with reference to circumstances and individuals, whereas legal rules are of general and absolute application."

One thing is sure that yet law has been parted with morals but still law is to achieve the purpose of its counterpart. In other words, law is to coincide with morals. Law cannot forget its source and cannot go far from morals. A law which opposes general will, has a short life as it will be soon violated by masses or be declared unconstitutional by the court or will remain unimplemented like a dead letter because the basic requirement of moral is lacking in it.

Yet there can be a situation when a law is opposed by general will (i.e. general public) but still the law is good if it has the basis of morality or public good. Such law is having morals as distant aim or to achieve distant good. Examples are

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[13] Roscoe pound, "Law and morals."

the Acts concerning prohibition of Sati tradition, Prohibition of smoking, Dowry prohibition etc.

Appraisal

It is universally accepted fact that law and morals were considered as one concept in ancient legal systems. But later on the law emerged from heterogeneous sources. The position is not of Indian legal system only rather of every legal system. In India, legal precepts came from divine law (i.e. Shruti, Smriti), customs, personal laws, foreign legal systems such as British and American legal systems. Still there is place of justice, equity, conscience, good faith in every legal system including the Indian legal system. Such concepts are the changed name of morality. Even while awarding compensation or punishment moral aspects are taken into consideration.

Human conduct is somewhat uncertain. Therefore, its regulation cannot be guided by the stable or fixed rules rather it requires regulation of it according to the justice justiceable to divergent conducts. Hence morality guides the decision.

In Panchayats, very serious disputes are solved not by law rather by moral principles. In India, Panchayats and social mediators are solving equal number of cases decided by the court on the basis of morality or justice.

Every person feels fear with morals, not with law because morality is such an idol well placed in the soul and is worshipped by each with devotion and emotion and the existence of which never denied.

A convict accepts the guilt and the sentence ordered because he feels guilty and such painful decision corresponds to his guilt. In other words, acceptance of guilt and acceptance of punishment are seem to be moral to him.

The relation between law and morals has been enumerated by Paton taking into account of human conduct in much beautiful words Paton said –

"In marriage, so long as love persists, there is little need of law to rule the relations of husband and wife but the solicitor comes in through the door, as love flies out of the windows.[14]

Even International Law has morals as its base. World wars have stimulated morality which ever guide not to repeat such blunder mistakes, hence various laws have been made to prevent wars. Nuremberg trial was based on morals. In the end it can be summarised that the law should coincide with morals.

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[14] Paton, "A Text Book of Jurisprudence."

2. SOURCES OF LAW

Introduction

After knowing the aspects of 'Law', it is very necessary to know the sources of law. There is difference between 'source' and 'origin' of law. Origin is placed at seniority than source. In other words, origin indicates starting point whereas source indicate gate of exit. Under various schools of Jurisprudence, we find the different origins of law e.g. under Hindu legal system and Muslim legal system the law originated from God. Austin says law originated from command of Sovereign. Savigny asserts origin in 'Volkgeist' (i.e. general will of the people). Sources of law are considered common in all legal systems.

In modern times, legislation is the important source of law but the role of precedent, custom, juristic writings, foreign decisions, morals etc. cannot be undervalued. Here we shall discuss these sources one by one which are commonly agreed by every legal system including Indian legal system :

A. Custom as a Source of Law

(i) Meaning of Custom : Any rule existing in the society which was not formulated by any agency and which has been accepted and followed since time immemorial also which has evidentiary value. It should be certain, reasonable and has been continued without any break. Custom is the primary and most important source of law. Here we will discuss its various aspects :

(ii) Origin of Custom : The views regarding origin of custom are divergent. According to the Historical jurists (of Germany) the origin of customs is from common consciousness of the people. Other jurists say that they originated due to necessity or convenience. Another view is that they are result of

imitation of a particular conduct by the group of people for a very long time. Some one say that social decisions are the basis of customs. Gray[15] says that custom often arises from judicial decisions.

Maine expressed his opinion about origin of custom in his theory of legal evolution that judgements of the kings under divine inspiration were the basis of the customs. Ihring supported this view. One thing is sure that constant following of some assertion give value to its existence; after passage of long time origin point disappears and the product (custom) gains sanctity. Ultimately it becomes law.

(iii) Place of Customs in different legal systems: In Roman legal system, customs have been given due regard and customs are considered the basis of law. After enactment of code, the customs were given second place but law did not detach from customs.

In Hindu Legal System, there is strong place of customs. Ancient Hindu law is composed of Smritis, Commentaries based on customs. Great sagas like Manu, Yajnavalkya, Brihaspati, Narda Mahabharata has given their version in importance of customs.

In Mohammedan Legal System much importance was not given to customs but several Mohammedan jurists admitted that those customs which were not expressly discarded by the Prophet were good law. In nutshell, the system could not remain far from customs.

In English Legal System, customs have leading place. English law is also known as 'common law'. It is generally accepted that common customs are the basis of common law.

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[15] Gray, "The nature and sources of law."

Pollock[16] said –

"The common law is a customary law"

St. German in his book *Doctor and Student* wrote –

"And because the said customs be neither against the law of God, nor the law of reason, and have always been taken to be good, and necessary for the Commonwealth of all the realm; therefore, they have obtained the strength of law".

Coke, Hale, Blackstone are supporters of the same view. The general view is same as of Salmond.

Salmond says –

"Common law is essentially judge made law." General view asserts that although it is judge made law but was guided by customs.

In French legal system, yet lower place has been given but cannot deny customs.

(iv) Requisites of Custom : Essentials or requisites are required before a custom get judicial recognition as similar to law. Blackstone, Cock and Allen[17] have pointed out following essentials :

(a) Antiquity : Before a customs is recognised as a law, the existence of such custom to be proved since time immemorial.

(b) Continuity : Such custom must have been practised or followed continuously without any break.

(c) Certainty : Vagueness disturbs the existence, therefore, custom must be certain and definite.

(d) Obligatory force : Such custom should have support of the general public.

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[16] Pollock, "First Book of Jurisprudence."

[17] Allen, "Law is the Making".

(e) Peaceable enjoyment : Its enjoyment should have passed peaceably, without interruption and without any dispute.

(f) Reasonable : It must be reasonable also. Reasons are the test of justiceability of the custom.

(g) Conformity with existing laws : It must be consistent with the existing laws because if a custom violates the laws will loose its validity or usefulness. Custom contrary to law is not acceptable. Custom can become a formal law if such custom is enacted a law by Parliament or State legislature, till that time it remains a custom having evidentiary value similar as of law if such custom fulfils above requisites.

(iv) Evidentiary Value : Austin says custom becomes law only after its recognition by the Sovereign. Gray speaks that law is what the judges declare. In other words both the jurists put emphasis on the recommendation of custom by some governmental agency as a pre-condition to become a law. Whereas opposite views are expressed by Savigny, he says that custom is per se law (law in itself). It has justification in itself being supported by public in general. Puchta was also of the same view.

In India there is customary law having full evidentiary value parallel to any statute. In modern Hindu Law, still the customs have been given the place e.g. nature of ceremonies of a Hindu Marriage has been left as per custom of the parties, adoption can be of any person of any age if customs permit.

The net position is that in modern time, the custom has full evidentiary value if it does not contradict the existing law or law itself has left the place of custom over an issue or where law is silent over an issue or where disputes are solved by the Panchayats. This position can be seen in any legal system in the world.

B. Precedent as a source of law

(i) Meaning of Precedent : This source is old and new as well. Previous decisions are referred in the later cases before the judicial institutions since time immemorial in every legal systems including Indian so that the decisions of the later cases might be pronounced in the light of previous decisions. Such previous decision is called judicial precedent or precedent. In modern time there is published reports of previous decisions but in ancient time this facility was not available but precedent continued to serve the legal system. Blackstone doubted the precedent as source, according to him Judges do not create new principles of law but jurists like Gray, Holmes, Cordozo, Frank were of the view that precedent creates the law. Oxford dictionary embodies the definition of precedent as –

"a previous instance or case which is, or may be taken as an example or rule for subsequent cases, or by which some similar act or circumstances may be supported or justified."

Gray defined precedent as –

"A precedent covers everything said or done, which furnishes a rule for subsequent practice."

Keeton also defined –

"A judicial precedent is a judicial decision to which authority has in some measure been attached."

All decisions are not precedent. Only those decisions are precedent which carry some rule newly pointed out. In Indian legal system at present, Article 141 of the Constitution carry the doctrine of precedent (or stare decisis). Accordingly, the decision of Supreme Court is binding on all the subordinate courts but Supreme Court is not bound by its own previous

decision[18], yet can take guidance. It means precedent has two characters – firstly, to bound and secondly to guide. Same position is of decision pronounced by the High Court. All subordinate courts of a High Court are bound to follow the decision of that High Court but decisions of other High Courts are mere guiding principles. High Court itself is not bound by its own earlier decisions. Hence all courts in India are bound to follow the decision of the Supreme Court even though they are contrary to decisions of the House of Lords[19] or of the Privy Council[20]. If there is conflict between decisions of the Supreme Court itself, it is the latest decision which will be binding[21] unless the earlier was of a larger Bench.[22] It is the opinion of majority of judges which is precedent.[23]

Concept 'ratio decidendi' and 'obiter dicta' are relevant with the doctrine of precedent. What is binding is the ratio of the decision and not any finding on facts.[24] An obiter dictum is an observation by a Court on a legal question suggested by a case before it, but not arising in such manner as to require decision. It is not binding as a precedent because the observation was unnecessary for the decision pronounced by the Court.[25]

(ii) Historical development in India

During British Rule : The Supreme Courts (established under Act of 1773) and High Courts (established under Act of 1861)

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[18] *Bengal Immunity Co. Ltd.* v. *Bihar*, AIR, 1955 SC, 661.

[19] *I.T. Commr.* V. *Shrinibbai, A.* 1956 Bom. 586; *Punjabi* v. *Shamroo, A.* 1955 Nag. 293.

[20] *Dwarka Das* v. *Sholapur Spinning Co.,* A 1954 SC 119.

[21] *State of Punjab* v. *Teja Singh*, (1976) Cr. L.J. 1648 (Punjab.) F. B.

[22] *Mattu Lal* v. *Radhe Lal*, A 1974 SC 1596 (Para 11).

[23] John Martin v. *State of W.B.,* A. 1975 SC 775 (Para 3).

[24] *Parkash* v. *State of U.P.*, A 1960 SC 195.

[25] *Madhav Rao* v. *U.O.I.,* A. 1971 SC 530.

were independent because they used to administer two different set of laws. No one was bound by the decision of other. But after the Government of India Act, 1935, Federal Court was established in India. This Act introduced the doctrine of precedent. Similarly, the decisions of the Privy Council had binding force on the courts below to it.

After Independence: After independence of India, Constitution provides place of the doctrine under its Article 141. Article 141 provides as –

"The law declared by the Supreme Court shall be binding on all courts within territory of India".

(iii) Merits of the Doctrine of Precedent

(a) Precedent is the reproduct of custom because the judicial authority did not evolve every principle from his own wisdom rather he or she took help from the then existing customs. Therefore precedent enjoys will of general public. That is why custom common in general public became common law in British legal system through precedent .

(b) According to Coke and Blackstone the doctrine attributes respect to ancestors.

(c) It gives convenience to the judges in later case as not to waste the time of the court on an issue well decided earlier.

(d) It also brings uniformity in judicial approach of hierarchy of the courts.

(e) It provides certainty to law because a long time accepted principle gives a certain shape to the answer of a question.

(f) Precedent is also called judge-made law. It means actual need for justice is seen and experience of judicial officers is utilised on a point in question.

(g) It also act as guide to the judicial officer not to detract from the right path.

(h) It also helps Advocates and general Public to be sure and certain about any law on a point. It removes diversity of opinion being supporter of repetition.

(iv) Demerits of the Doctrine of Precedent

Following are the views of disfavour to the doctrine :

(a) Wrong or confused decision of superior court will commit injustice in the cases of subordinate court. Hence it can cause error in greatest number. Many times the decision of Supreme Court and High Courts were reversed by these courts themselves.

(b) It pre-supposes the supremacy of the mind of the court of superior judges which is against rule of nature.

(c) It makes subordinate judges dull and idle because it restrains them to think new.

(d) It some time results in injustice because every case has its own typical facts and situation which do not require the guidance of another case having different facts and nature. Now-a-day, practically earlier decisions are seen and not the facts of those cases which is improper.

(e) It restrains development of law and legal approach because it directs not to think otherwise rather to apply whatever have been decided earlier.

(f) That rich Advocate remains in benefit who has number of Reports of decided cases who can show the earlier decisions on the point of either side to the judicial officer whichever favour to his client, moreover he can mislead the court by showing overruled decision. Hence the poor Advocate becomes the looser in that case because he can not confirm the decisions shown by his opposite counsel being lack of Reports.

(v) Importance of the doctrine

Precedent or Judge-made law has much importance in every legal system. In India there are many decisions of Supreme Court and various High Courts which are old precedents guiding for long time. For instance the demarcation of 'Basic structure' in the constitution which cannot be subject matter of amendment is the legal product of the Apex Court. Fundamental Right of personal liberty has also been developed by the Apex Court upto great extent. Thus precedent gives an opportunity to analyse the question in the light of already decided cases. Wherever law is silent about any question the precedent plays an active role in filling up that gap or vacuum.

Decisions of District Courts or local courts are not published and are not shown as precedent. The decisions of the Supreme Court and High Courts are published in various reports e.g. All India Reports, Supreme Court Reports, Supreme Court Journal, Supreme Court Cases, Indian Law Reports, Punjab Law Journal, Madras Law Journal, etc.

C. Legislation as a source of Law

(i) Meaning of legislation

Legislation means law making by a prescribed body or person. It is modern source of law. Legislation is available in every legal system of the world. Legislation has the force of Sovereign (Ruler or Government) for implementation of the law enacted hence no need of liking of it by general public. Although that law becomes successful which is liked by the general public also. Laws are made through legislation as per need. The authority of legislation is de-jure whereas the authority behind custom is de-facto. Analytical jurists are of the view that it is the legislation only which can make law. But historical jurists have different view they say legislators only

collect the customs and give better shape to them inspite of creating new law reason being of impossibility to create. 'Legislation' has second meaning also i.e. statute, law, rule, regulation, order, ordinance, direction, notification, by laws etc.

(ii) Kinds of Legislation

When Sovereign authority makes the law as Parliament of India or State legislature, it is called direct legislation or Supreme Legislation. Where this authority is granted by the Supreme Legislation to another body (i.e. Municipal Corporation, Panchayats, University, Judiciary, etc.) it is called indirect or subordinate legislation. In such legislation the body which frames the law is either executive or judiciary, other than legislature.

(iii) Types of Law framed under Subordinate Legislation

(a) **Local Laws :** Municipal Corporation, Zila Parisad etc. frame such laws discharging functions of subordinate legislation.

(b) **Laws of Autonomous body:** University, Railway discharging their functions as subordinate legislation enact their respective laws, rules etc.

(c) **Laws or Rules of Judiciary** : Supreme Court and High Courts frame these enactments for regulation of their procedure and administration.

(d) **Colonial Laws** : A body or authorised person of countries (not independent) frame the laws subject to Supreme Legislation (i.e. the legislation of ruling country).

(e) **Executive made law (or Delegated Legislation)**: Government departments frame these laws. Such legislation is called 'delegated legislation'. Delegated legislation is called when the power of legislation is

delegated by Supreme Legislation to executive wing of the country i.e. governmental departments, hence does not cover that body or person mentioned in sub clause (a) to (d) above. Body or person under sub clause (a) to (d) is called subordinate legislation because here delegation is given either to autonomous body or judiciary but not to governmental departments.

(iv) Reasons for Emergence of Delegated Legislation

In sub clause (e) above we have discussed the meaning of delegated legislation. Here we will study the compelling reasons of this delegation :

(1) Shortage of time : Parliament or State Legislatures have shortage of time due to heavy burden of work that is why the legislating powers are delegated by these bodies to any other body or person.

(2) Urgency or Emergency : Situation may be so urgent or compelling which require urgent guidelines. Therefore, need for delegated legislation is justified.

(3) Technical subject : On a particular technical subject the concerned government department can frame law easily.

(4) Local matter : In some matters consultation is required from local residents which is possible only if such exercise is undertaken by delegated legislation.

(v) Limitations against Delegated Legislation and subordinate legislation

Such legislation is not authorised to act in discriminatory way. Following limitations or controls are provided for :

(a) Parliamentary and Legislative Control : The Supreme Legislation (i.e. Parliament and Legislatures of States) delegate the powers after well discussion in the house. Even if such

legislation is exceeding its limits, the same subject may be discussed in Supreme Legislation and the proper decision may be taken in this respect. Powers of such legislation may be withdrawn or curtailed.

(b) Judicial Control : Judiciary can evaluate the law or rules framed by such legislation in terms of their validity or authority delegated to it and can hold any law or rules so framed as unconstitutional, invalid etc.

(c) Control of Publicity : By publishing the area of delegated powers, the citizens can be acquainted with the actual jurisdiction of the such legislation so that the same may not be misused or exceeded the limits.

In the end it can be observed that Legislation is the most important and modern source of law. As regards misuse of powers by such legislation, Union list, State list, Concurrent list are provided in the Constitution which reveal area of legislation of Centre and States respectively.

Secondly, the above mentioned checks or limitations control the misuse of delegated power of legislation.

D. Statutory Interpretation as a Source of Law

(i) Meaning : While applying law on a particular issue the letters and expressions of the Act are evaluated or assessed so that the object of the law should co-relate with the issue in hand. The process to draw the true meaning of the letters and expression of a Statute is called interpretation. For a layman interpretation may seem to be a simple job but in reality it is a work of responsibility and of vast legal knowledge. This process creates the law, principles, etc.

Maxwell's book on interpretation contains multiple knowledge of interpretation. Principles of interpretation are not stable rather remains changing. While interpreting any

provision of law, the help of other laws, customary laws, dictionary meaning and principles of interpretation is taken.

(ii) Basic Principles of Interpretation : There are two basic principles namely (a) Literal and (b) Liberal).

(a) Literal principle : The meaning of the principle is that the judge should ascertain the intention of the legislature only from the words used in such statute (i.e law). He is not to take help of any other law or material. It means judge is to take the direct meaning of the words used. Such type of interpretation is also called grammatical interpretation or strict interpretation.

Demerits of Literal Interpretation

(1) Inconsistency : When parts of the Statute in hand are contrary to each other, this interpretation will cause injustice.

(2) Ambiguity : When any word or term has multiple meaning, then to choose any one of them and leaving others without any justification is apparent injustice. For ends of justice the Judge should apply the 'Golden rule' (i.e. to take help from other sources) or 'Mischief rule' (i.e. to ascertain the policy of the disputed Statute).

(b) Liberal Principle : The principle suggests that the judge should not confine to the meaning of the letters or terms of the Statute rather beyond to them he should take the help of historical facts, objects and reasons of the statute, necessity of the enactment and other Statutes. This interpretation is also called 'historical interpretation' and 'sociological interpretation'.

Hence interpretation is a modern and important source of law. It is in reality, it is a source which is product of analysis, evaluation of the statutory material.

E. Constitution as a source of law

Constitution of any legal system is the fundamental legislation. In India, the Constitution is the Grundnorm, fundamental legislation. No enactment can be passed by Supreme Legislation or Subordinate legislation or Delegated Legislation in contravention of the Constitution. Constitution as a source differs from legislation as a source because the latter derives its authority from the former. Secondly, Constitution contains doctrine of equity and morality in its Part IV (Directive Principles of State Policy) which directs the State to enact any enactment in furtherance of the ideals embodied in the Part.

Hence, Constitution is like a battery in the vehicle which supplies current to the headlights. Here head lights are Parliament and State legislatures who get authority and control from the Constitution. Therefore, if legislation is considered source of law then definitely the superior or fundamental legislation (Constitution) also deserves to be called as source of law because it reflects and inspires new areas for legislation. Even the Constitution guides the judge while formulating a principle as precedent or interpreting any enactment.

F. Religion as a source of law

Law is a word of civilised society whereas the word religion is an ancient or primitive tradition. Religion took birth from the day when man started to live in society. Certainly way of life had some norms or rules to govern. Gradually these norms acquired a title i.e. religion. When different groups of persons developed divergent norms of way of life, they gave different name to their religion. Hence the human being of different religions clash with each other and have different nomenclature of their religion. For advancement of

one's religion, religious preaches and traditions are evolved. These traditions become the laws as is evidenced by the contents of personal laws i.e. Hindu law, Muslim law, Christian law, etc.

G. Other Sources of Law

Apart from above mentioned basic sources of law, there are some other sources of law namely (i) Equity and Morals ; (ii) Opinions and observation of legal experts.

In England there had been separate court of equity known as Chancery court. Equity means justiceable. Doctrine of equity was used to supplement the law or to guide the judge on a point of confusion. In India yet there had not been any special court of equity but equity has been applied even upto present time in the courts. Some Statutes applicable in India contains 'equity' in the name of 'good faith' as used in Transfer of Property Act 1882 and the Indian Penal Code 1860. The phrase 'Justice, Equity and Good Conscience' has been used as guiding principle in courts of England and also in Indian Courts. The importance of morality in giving birth to law has already been discussed in detail in this part. Admittedly, the morals are important source of law.

Opinions and observation of jurists or legal experts written in text books or in Articles are taken as guidance in the courts. This research work enlightens the judicial officer because such material is written systematically, historically and with reasons. Many legal rights have been invented or enunciated by these writers such as right to know, right to give reasonable opportunity of hearing, new rights under the cover of the Fundamental Right of Life and Personal Liberty (Article 21 of the Constitution). The simple reason is that every legal problem first of all sensitise the jurists and legal experts.

3. RULE OF LAW AND ITS POSITION IN INDIA

(i) Meaning and Historical Development

The doctrine of 'Rule of Law' has been given due place in Indian Legal System. Meaning of the doctrine is that no body is above to law. In other words every citizen or institution is under the law. Thus supremacy of the law has been enshrined, therefore, even State is under the law. The doctrine is in opposition of arbitrariness of public officials.

Rule of Law is one of the basic principles of the English Constitution. The doctrine has a place in the Constitution of U.S.A. and India. Sir Edward Coke, the Chief Justice in reign of James-I, originated the doctrine. Dicey developed the theory of Coke in his book in 1885.

The Dicey's 'Laisses faire' (i.e. Rule of Law) suggested that rule of law can be achieved by making general laws and permitting no discretion or minimum discretion to the Administrator. This concept was criticized on the ground that if absence of discretion is the rule of law then it has never existed anywhere nor there is possibility in future to exist[26].

According to Dicey –

"Englishmen are ruled by Law, and by the laws alone; a man with us may be punished for a breach of law, but can be punished for nothing else".[27]

Magna Carta expressed –

"No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed nor will we go send for him, except under a lawful judgement of his peers and by the law of the land."

Wade pointed out

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[26] K.C. Davis, Administrative Law Text.

[27] Dicey, The Law and the Constitution, 1915, p. 202.

"The rule of law requires that the government should be subject to the law, rather than the law subject to the government."[28]

(ii) Three Principles of Rule of Law

Dicey pointed out in his book the following three principles necessary for application of the doctrine :

(1) Supremacy of law

(2) Equality before law

(3) Predominance of legal spirit

(1) Supremacy of law

Elaborating the first principle, Dicey was of the view that absolute supremacy or predominance of law as opposed to the influence of arbitrary power or discretionary or prerogative power of the government is necessary. He was of the view that wherever discretion, prerogative power exists, it converts into 'rule of jungle'.

(2) Equality before Law

Explaining the second principle he was of the view that there must be equality before the law of all citizens, classes, institutions of the society. Hence there must be same law and courts for all without any exception. Contrary to it, French Legal System contains the system of 'droit administratif' according to which separate courts are provided for officials of the State (i.e. civil servants).

(3) Predominance of legal spirit

Pointing out the meaning of the third principle, he advocated for judicial supremacy and he thus explained that because the general principles of the Constitution of England are the result of judicial decisions of the courts, therefore, role of courts of law is most important as the courts can act as

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[28] Wade, Administrative Law, 1988, p. 33.

guarantor of liberty in better way. His emphasis was on independent and strong judiciary so that legal spirit may survive. He was against the inclusion of Fundamental Rights in the book 'Constitution' as dead letters (or a show piece) having no enforcing responsibility. Dicey said about the Constitution as "Our Constitution, in short, is a judge-made Constitution, and it bears on its face all the features, good and bad, of judge-made law.[29]

Also admitted by Wade[30], "The British Constitution is founded on this doctrine." If we do true evaluation, the doctrine has been incorporated in English, American and Indian legal system but not upto the extent as desired by Dicey. In England itself, the area of discretion has been left in various enactments. The same is the position in U.S.A. and India. The simple reason behind it, is that society is changing day by day, problems are coming in new shapes and every litigation has its own unique story therefore, it is necessary to leave the area of discretion in a law for the presiding officer of the institution so that he can give justice to the parties. If such discretion is used in arbitrary manner, then judiciary must check and control the officer concerned.

Dicey's doctrine is also known as rights of citizens. The International Commission of Jurists, in their 'Delhi Declaration' in 1959 accepted the idea of the rule of law as a modern form of law of nature. Wade and Phillips in support of the doctrine said –

> "It is accepted in almost all the countries outside the Communist World with some variations. It is invoked in modern democratic countries to

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[29] Dicey, The Law of the Constitution, 1915 p.195.

[30] Wade, Administrative Law, 1988, p. 23.

keep control over the oppressive, capricious and arbitrary exercise of powers by the administrative authorities."[31]

(iii) Modern Concept of the Rule of Law

Dicey's doctrine could not be implemented in totality even in 1885 when he formulated it but considerable part of the doctrine is enjoying the place in modern doctrine of Rule of law. Davis[32] pointed out modern concept of the doctrine in seven principal meanings of the doctrine e.g. (1) Law and order; (2) Fixed rules; (3) Elimination of discretion; (4) Due process of law or fairness; (5) Natural law or observance of the principles of natural justice; (6) Preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) judicial review of administrative actions.

(iv) Rule of Law during British Rule

Mostly ancient law provided legalised inequality with lowest caste persons as these persons were treated with no human dignity. But the position changed during British rule.

As the East India Company entered in India in 1612 till that time, the doctrine of Rule of Law had not taken birth in England.

The judiciary (i.e. Supreme Court at Calcutta) was made independent by the Charter of 1774. But the same was curtailed by the Act of Settlement 1781.

The criminal administration had been under executive organ throughout the British rule. Racial discrimination (i.e. between Britishers and Indians) was also maintained till independence of India.

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[31] Wade and Phillips, Constitutional Law, 1960, pp. 70-73.

[32] Davis, Administrative law, 1959, pp. 24-27.

Upto Indian Council Act, 1861, no distinction was made between executive and legislative business. Remedy of writs was available in restricted form with the Supreme Courts and High Court at Calcutta, it came to be available in all the High Courts only in 1923. Till passing of the Government of India Act, 1935, there were no constitutional rights of the citizens could be called as guaranteed. The Act of 1935 protected the right to property. The Act also prohibited discrimination on grounds of race, religion, etc. but only with regard to property and occupation and not in other matters. Special attention was given by Lord Cornwallis during his Governor Generalship in whose period features of Rule of Law can be seen in its elementary form as per Cornwallis's plan of 1793. The features of the plan were :

(A) Separation of judiciary from executive;

(B) Executive placed under judicial control;

(C) Establishment of government liability;

(D) Organisation of legal profession;

(E) Extension of Diwani Court's jurisdiction over British subjects.

(v) Rule of Law under Constitution of India

Dicey's doctrine has been adopted and incorporated in the Constitution of India. This doctrine or concept can be seen in the following provisions of the Indian Constitution.

(1) The preamble itself contains the ideals of justice, liberty and equality.

(2) The above ideals are enshrined in Chapter III as Fundamental Rights which are enforceable.

(3) The damages can be recovered from the Government.

(4) There is supremacy of the Constitution over three organs i.e. Executive, Legislature and Judiciary.

(5) Out of the above three organs Judiciary is supreme.

(6) An opportunity of judicial review is embodied.

(7) All rules, regulations, ordinances, bye-laws, notifications, customs and usages are laws within the meaning of Article 13 and if they are contrary to the Constitution, the same can be declared as ultra vires of the Constitution by the Supreme Court or High Court.

(8) The President is to take oath to preserve, protect and defend the Constitution.

(9) Fundamental Right of life and personal liberty under Article 21.

(10) No deprivation of property save by authority of law provided under Article 300A.

(11) The Government (Central or State) and the public officials are not above to law.

(12) The prerogative 'king can do no wrong' does not apply in India.

(13) There is 'equality before the law' and 'equal protection of laws' under Article 14. The doctrine of Rule of Law has been given place in specific words above mentioned under this Article yet the doctrine is reflected by every corner of the Constitution in the form of policy or objects of the provisions.

(14) The Laws, Courts, Procedure are same for all may be an ordinary citizen or high officials of the State (i.e. in contrary to French Legal System where separate courts for officials of state are provided) yet by the Constitution (42nd Amendment Act, 1976, the Parliament was empowered under Part XIVA (Article 323A and 323 B) to set up various Administrative Tribunals for dealing with subjects ranging from

disputes of government servants to foreign exchange and production and distribution of foodstuffs and other essential commodities. But again, the above provision for setting up Administrative Tribunals is just to facilitate the ordinary courts in reducing the burden of litigation work otherwise no class of citizens or institution or Government enjoy any immunity from the ordinary Courts. Still any class of citizens (high officials), institution or Government can and can be sued in ordinary court for tort, breach of contract, damages, defamation crime etc. except the matter falls within the above mentioned Administrative Tribunals.

(15) Separation of Executive, Legislature and Judiciary has been enshrined so that no one can become arbitrary.

(16) Directive Principles of State Policy embodied in Part IV directs the Government to take measure in advancement of the ideals of justice, liberty, equality and fraternity.

Hence the doctrine of Rule of Law is the basis of the Constitution. The doctrine is the fragrance found in all the ideal flowers (Preamble, Fundamental Rights, Directive Principles of State Policy etc.) yet it has a specific place under Article 14 of the Constitution of India. In **Kesavananda Bharti** v. **State of Kerala**[33], the Supreme Court observed that Rule of Law is an aspect of the doctrine of basic structure of the Constitution.

(vi) Report of International Congress of Jurists (1959)

The International Commission of Jurists (a consultative wing of the United Nations) comprised of jurists from all over

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[33] AIR 1973 SC 1461; *Mohinder Singh Gill* v. *Chief Elect. Commr.*, AIR 1978 SC 851.

the world organised an International Congress of Jurists at New Delhi in 1959 to find out the true meaning of Rule of Law in the present day of free society. In the 'working proper' prepared by the above Congress, it was observed that rule of law has two aspects – firstly substantive and secondly, procedural. The Congress did not study the substantive aspect in detail. The study of procedural aspect was conducted through four committees whose recommendations were as follows:

(1) The legislature and the rule of law (first committee)

In order to restrain the Legislature following recommendations were placed :

(i) Legislature should not enact discriminatory laws.

(ii) Should not enact laws interfering with freedom of religion speech, assembly, fundamental rights.

(iii) Should not enact retroactive law.

(iv) Should not enact laws denying the right to elect responsible government.

(2) The Executive and the Rule of Law (Second Committee)

In order to direct the executive following recommendations were placed :

(i) There should be adequate safeguards against abuse of power by the Executive officials.

(ii) There should be effective government capable of maintaining law and order.

(iii) The Executive should ensure adequate social and economic conditions of the citizens.

(3) The Criminal Process and the Rule of Law (Third Committee)

Following recommendations were placed :

(i) There should be certainty of the Criminal Law.

(ii) There should be right to legal remedies including appeal in case of victimisation.

(iii) Arrest should be strictly regulated by law.

(iv) During pendency of trial detention should be effected in the interest of public security or for justice.

(v) Counsel of one's choice be permitted.

(vi) Accused should not be compelled to incriminate himself.

(4) Judiciary, Legal Profession and the Rule of Law (Fourth Committee)

Following recommendations were placed :

(i) Judiciary should be independent for free society i.e. there should be no interference of executive or legislature in the exercise of judicial functions.

(ii) Judges should be given adequate remuneration.

(iii) There should be organised legal profession free to manage its own affairs.

(iv) Laws should be equal for rich and poor.

(v) Legal aid programmes must be laid out with the efforts of legal profession.

(vii) Important Observations

In the Fourteenth Report of the Law Commission of India[34] it was stated–

"Our Constitution in its preamble aspires to build a sovereign democratic republic dedicated to ideas of justice, liberty, equality and fraternity... The Constitution has further taken care to provide us with the bulwark of an

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[34] (1958) 14th Report, p. 671.

integrated and irremovable judiciary so that our newborn democracy may be assured of proper growth under the wings of a watchful and vigilant group of judges."

In a leading case **Reliance Petro Chemicals Ltd.** v. **Indian Express Newspapers,**[35] Mukarji, J. observed –

"We must remember that the people at large have a right to know in order to be able to take part in a participatory development in the industrial life and democracy. Right to know is a basic right which citizens of a free country aspire for in the broader horizon of the right to live in this age in our land under Article 21 of the Constitution.... That right puts greater responsibility upon those who take upon themselves responsibility to inform."

(viii) Habeas Corpus Case

On June 25, 1975 emergency was proclaimed by Mrs. Gandhi's government on account of "internal disturbances". By virtue of Article 358 of the Constitution the citizen's seven classic freedoms under Article 19 stood automatically suspended. On June 27 the President issued an order under Article 359 suspending the enforcement of Article 14, 21 and 22 also. On the night of June 25 and thereafter a large number of persons were detained under the Maintenance of Internal Security Act 1977 (M.I.S.A.). Many of them were not even informed of the grounds for their detention. Some of them filed Writ Petitions in different High Courts for issuance of writ of habeas corpus. Ultimately the matter came before the

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[35] 1988, 4, SCC, 592: AIR 1989 SC 190.

Supreme Court. The position was considerably changed with the decision by the Supreme Court in the present case A.D.M. Jabalpur V. Shrivakant Sukla[36]. The issue was whether there was any 'Rule of Law' in India apart from Article 21 of the Constitution of India? The majority of the Bench (Ray, Chief Justice, Beg, Chanderchud, and Bhagwati, JJ.) answered the issue in the negative. But Justice Khanna, however did not agree with the majority view hence he expressed his dissenting views[37] which seem to be more reasonable and are based on sound footings.

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[36] (1976) 2 SCC 521 : AIR 1976 SC 1207 : 1976 Suppl. SCR 172.

[37] (1976) 2 SCC 521 paras 525-536, 575, 593.

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